Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-2000

STUART RICHARD COHEN,
Petitioner,

vs.

COMMONWEALTH OF PENNSYLVANIA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

Stuart Richard Cohen petitions for a writ of certiorari to review the judgment of the Supreme Court of Pennsylvania entered in this case on April 30, 1980, insofar as it holds that he is subject to retrial.

OPINIONS BELOW

The opinion of the Supreme Court of Pennsylvania (App. B., *infra,* p. 2a) is reported at 413 A.2d 1066. The opinion of the Court of Common Pleas (App. E. *infra,* pp. 29a-71a) is not reported.

JURISDICTION

The judgment of the Supreme Court of Pennsylvania was entered on April 30, 1980 (App. A., *infra,* p. 1a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3). The Petition is filed within the period permitted by Rule 22(1) of this Court.

QUESTION PRESENTED

Whether a reprosecution is barred as a matter of Due Process of Law or the Double Jeopardy Clause, when a reversed conviction has been obtained by egregious prosecutorial misconduct, including intimidation of witnesses by describing "in lurid detail" the electric chair and the smell of burning flesh to them, wilful interference with defense access to witnesses, and deliberate and repeated violation of well-settled canons of prosecutorial conduct by vouching for the credibility of prosecution witnesses, claiming that the prosecutor was not an advocate but instead represented the jurors, and introducing inflammatory evidence and statements concerning uncharged crimes and defendant's wealth.

STATEMENT

This proceeding arises from a prosecution for murder and conspiracy to murder brought against Petitioner Stuart Richard Cohen in the Court of Common Pleas, Berks County, Pennsylvania. Cohen, then an 18 year old of diminutive stature (less than five feet tall), and wealthy parentage, was accused of hiring certain other persons to kill one Steven Warunek, who reportedly had threatened to kill Petitioner. As appears from the opinion of the Supreme Court of Pennsylvania re-

versing Petitioner's conviction for third degree murder and conspiracy to murder, on the ground that Due Process had required granting Petitioner a change of venue, the case immediately became a media event in the Reading, Pennsylvania area. The coverage was massive and included reportage of statements in public places by the District Attorney or his assistants that he would be standing beside Mr. Cohen when they pulled the switch and characterizing the case as involving a "contract killing" (Venue Exh. 23, pp. 647, 650, 731).[1]

The prosecution, at all stages from investigation through final argument at trial, also was marked by severe misconduct. The evidence of this misconduct consists not of defense testimony, but rather of testimony of the Police Prosecutor (the detective in charge of the investigation for the Commonwealth) and the President Judge of the Court of Common Pleas, the indisputable transcript of what took place at trial, and the confession of error in the Supreme Court of Pennsylvania by the successor District Attorney that (Br. in Pennsylvania Sup. Ct., p. 5):

> "A careful examination indicates that the record is replete with varying and recurring instances of improper conduct on the part of the prosecutorial staff of the prior administration. These instances go far beyond the bounds of advocacy or zeal in prosecution .... Before the trial itself, the District Attorney made such statements referring to 'burning flesh in the electric chair,' wanting to be in the same room 'when the switch was pulled,' and a threat to a witness that he could receive the electric chair unless he testified.

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[1] "Venue Exh." refers to the transcript of the hearing on reduction of bail.

> These tend to show a pattern of overzealousness and smack of improper persuasion."

Specifically, the evidence of misconduct from such sources included the following:

The police prosecutor, Detective John Halstead, as well as the Commonwealth's own witnesses, testified that the District Attorney and one of his assistants had elicited statements implicating Cohen by threatening the witnesses with the electric chair and describing it and the smell of burning flesh to them "in lurid detail." At least seven witnesses were subjected to this mode of questioning (R. 35a, 37a, 40a-44a, 52a-53a, 404a-405a, 434a, 443a-444a, 458a-459, 462a).[2] The principal government witness, Jack Geisler, broke down and cried during his interrogation, in which the Assistant District Attorney John J. Murphy, Jr., was shouting as well as describing the electric chair (R. 40a, 458a-459a). Another key witness, Anthony Reynolds, was told that every effort would be made to see that he went to the electric chair unless he testified against Richard Cohen (R. 44a); witness Richard Wamsher was told that he would be knocked "on his ass" if he did not talk (R. 32a, 455a). Robert L. VanHoove, the District Attorney, remarked to a room full of people that he would be standing beside Mr. Cohen when they pulled the switch (R. 33a-34a, 456a).

In addition to threatening prospective witnesses, the Commonwealth Attorneys at times made unusual promises or showed unusual leniency. For example, they promised Reynolds that they would confer with the Judge "to determine what could be done for Mr.

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[2] "R." refers to the Reproduced Record (*i.e.*, appendix) filed in the Supreme Court of Pennsylvania.

Reynolds" (R. 35a). When Geisler became ill in prison Assistant District Attorney Murphy obtained his release without bond by signing personally as surety, an action which was "highly improper and contrary to the rules of procedure and rules of law," according to President Judge W. Richard Eshelman, who ordered Geisler back to prison as soon as the matter was brought to his attention (R. 55a-56a, 57a, 58a, 477a). Although Geisler admitted to having lied repeatedly under oath in pretrial proceedings (*e.g.*, R. 366a, 368a, 370a-371a, 375a, 396a), he was never charged with perjury (R. 51a).

This coercion had its expectable effect: witnesses who had not implicated Cohen in any way in their initial statements to the authorities began to do so; and ultimately they became the key prosecution witnesses.[3]

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[3] In particular, Geisler did not implicate Mr. Cohen in his statements of November 18 and 19, 1974 (Trial Tr. 201, 202, 205), nor in his testimony one month later at a preliminary hearing in the case against George Arms, who was alleged to have done the shooting of Warunek (Trial Tr. 206-207, 213). As late as January 24, 1975, he testified that the purpose of the alleged agreement with Cohen was "messing up," but not killing, Warunek (Trial Tr. 240).

That testimony was most unsatisfactory to the prosecutors, for it tended to support a principal defense theory that the idea of killing Warunek was arrived at by Messrs. Geisler, Reynolds and Arms, because of an *animus* towards Warunek that one or more of them had for reasons unrelated to Mr. Cohen. Thus the defense was that, even though Cohen may have wished Warunek frightened off from his threats to Cohen, he did not wish or conspire to kill him. This defense theory was strongly supported at trial by evidense that Arms and other persons possibly implicated in Warunek's death had previously been involved in a violent shooting episode in front of Warunek's house, that had no connection at all with Mr. Cohen (R. 473a, 480-481a). As will appear in the text, the jury, despite its adverse verdict, indicated in a note to the Court that it did not believe that Cohen intended to have Warunek killed (R. 514a, 541a).

Reynolds also first gave a statement on January 31, 1975 (R.

The District Attorney's office wilfully impeded defense counsel's interviews of witnesses by instructing turnkeys not to permit imprisoned witnesses to speak with defense counsel and instructing other witnesses not to speak with defense counsel outside the presence of the Assistant District Attorney (R. 434a, 461a). For example, a memorandum on official stationery specified that (R. 537a, 461a):

> "No individuals, police personnel or private citizens or attorneys or anyone else shall be permitted or allowed to have any conversation with Richard John Abraham unless I personally am present.
>
> "Robert L. Van Hoove
> District Attorney"

Similar letters were promulgated with respect to other witnesses (R. 461a). Also, the Assistant District Attorney instructed the police prosecutor not to keep daily investigation reports, in disregard of the police department's standard procedure (R. 459a-460a).

The prosecutorial misconduct continued throughout Richard Cohen's trial. In opening argument, the Assistant District Attorney personally vouched for his witnesses' credibility (R. 326a-327a):

> "Needless to say, on behalf of the witnesses which I introduce . . . to you, I am vouching for the truth of what they are saying. I am putting them on the stand because I believe them" (R. 326a).
>
> "I vouch the truth of the testimony I present . . ." (R. 327a).

He elicited evidence from Commonwealth witnesses that Cohen was engaged in illegal drug supplying (R.

530a), after being subjected to the threats and promises (R. 35a-36a).

337a-338a, 339a-341a, 408a-412a, 414a, 425a-429a, 437a-438a), a crime with which Cohen was never charged. He cross-examined Cohen as to other uncharged criminal activities—illegal drug use (R. 469a, 470a-472a) and failure to support an illegitimate child (R. 468a). In closing, he argued to the jury in crude, inflammatory language that Cohen was a purveyor of drugs (R. 489a-491a, 493a) and much wealthier than the others allegedly involved (R. 487a-488a, 490a).[4] The Assistant District Attorney added that he "would not knowingly put a liar on the witness stand" (R. 485a-486a). He appealed for personal sympathy by telling the jury that he was the youngest assistant district attorney in Berks County (R. 495a) and evoked the image of himself as a student in a cramped apartment (R. 487a-488a). He went on to express his personal belief that Cohen was guilty (R. 498a). He misrepresented himself as the jurors' representative:

> "[T]he roles which Mr. Dimitriou [defense counsel] and I occupy in this proceeding are similar and yet in many respects fundamentally different. Mr. Dimitriou is an advocate . . . .
>
> "My role is not as an advocate. My role is to represent the Commonwealth, to represent the citizens of Berks County. To represent you, each and every one of of you, and each and every one of the people outside this building in this county, and to represent you in the pursuit of justice" (R. 483a).

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[4] ". . . pretty soon Richie Cohen rolls up. Richard Cohen comes down to South Eighth Street in his important sports car to meet his new friends" (R. 490a).

"Eyes light up around 111 South Eighth Street. Richie Cohen, who supplied them with some good dope the night before, with some marijuana, some kind of white powder, PCP, THC, whatever" (R. 489-490a).

Defense counsel repeatedly objected to the prosecutorial misconduct. An Application and Reapplication to Disqualify the District Attorney, *et al.*, were supported by written and testimonial evidence of the Commonwealth's threats against witnesses, the improper release of Geisler from prison, the personal animus of the District Attorney toward Cohen, and the failure to initiate prosecutions against key witnesses. The Trial Court denied the Application and Reapplication (R. 59a, 136a).

At the end of opening arguments, the defense moved for a mistrial based upon the prosecutor's statement that he vouched for the credibility of his witnesses (R. 328a); this was denied as "untimely" (R. 329a)—though it came in time for corrective action to be taken and hence was timely under Pennsylvania precedent.[5] The defense objected at the outset to Geisler's testimony, based on the prosecutor's coercion of the witness (R. 335a) and moved to strike Reynolds' testimony for the same reason (R. 423a); both objections were denied (R. 336a, 424a). The defense demurred to the Commonwealth's case based on the Commonwealth's knowing use of perjured and coerced testimony and abuse of the prosecutorial prerogative in violation of Defendant's right to due process; the Demurrer was refused by the Court (R. 449a).

The defense's Motion For Directed Verdict restated these reasons and also raised the prosecution's obstruction of defense access to witnesses; it, too, was denied. The defense requested the Trial Judge to instruct the jury on prosecutorial misconduct (R. 554a); this re-

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[5] *Commonwealth* v. *Smith*, 464 Pa. 314, 346 A.2d 757, 758-759 (1975).

quest was refused and the defense objected (R. 510a-511a). Defendant's Motion and Supplemental Motion for Arrest of Judgment and for a New Trial, and the accompanying Memorandum, again contended that the prosecution's misconduct required not only vacation of the conviction but dismissal of the indictment (Post-trial Memorandum, pp. 26-41). The Trial Court rejected these arguments (App. E., pp. 55a-65a).

The jury after indicating in a note that it disbelieved the prosecution testimony that Cohen had intended the killing of the decedent, and believed instead that the death had been unintentional, returned a verdict of guilty of murder in the third degree and conspiracy to murder.[6] The trial judge denied all posttrial motions, including those based upon the refusal to grant Petitioner a change of venue, and upon prosecutorial misconduct (App. E., p. 71a).

At Cohen's sentencing, the successor District Attorney, Michael Morrissey, acknowledged (R. 580a) that "to me, there are questions of prosecutorial misconduct and the fact that one of the witnesses, who took a plea to third degree murder, obviously perjured himself four or five times under oath" (R. 580a). At the

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[6] A few minutes before returning its verdict, the jury made the following written inquiry to the Court:

> "Does the conspiracy to frighten or beat become a conspiracy to commit murder with the death of the victim, even though the death was unintentional?" (R. 514a, 541a).

In Petitioner's view, the proper answer to this question was simply "no," *see* Comments to ALI Model Penal Code, Tenative Draft No. 10 at 109-10 (1960) (incorporated in official draft), and his conspiracy conviction was produced by a convoluted and erroneous instruction in response to the jury's question. In view of the vacation of the conviction, that issue, however, is now moot.

subsequent trial of alleged co-conspirator, George Arms, Assistant District Attorney James R. Hevalow stated that prosecutor Murphy's actions "are not pleasant to me as a lawyer" and were "an over-involvement that should not have happened."

In the Supreme Court of Pennsylvania, the District Attorney confessed error as noted above.[7] That Court held that Mr. Cohen's right to a trial by an impartial jury had been violated by the refusal of the Trial Court to transfer venue (App. B., p. 22a). It noted, *inter alia,* the massive prejudicial publicity, contributed to by the remarks of the District Attorney, and the fact that more than half the venire had to be excused for cause because of fixed opinions as to guilt.

However, the Pennsylvania Supreme Court refused to "accept appellant's claim that a new trial is not a sufficient remedy for the asserted prosecutorial misconduct." It incorrectly characterized Cohen's position as being based wholly upon "an unsupportable assumption that a fair trial cannot be had in the future." In actuality, Cohen contended not only that the

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[7] As recounted in the opinion below (App. B., pp. 8a-9a n.8), after argument and the District Attorney's confession of error, local authorities persuaded the Pennsylvania Attorney General's Office to attempt to supersede the District Attorney, who obviously had acted in accordance with the highest standards of professional responsibility of his office, *see United States* v. *Willis*, 606 F.2d 391 (3d Cir. 1979). Supersession was not allowed but the representative of State Attorney General's office was permitted to appear as an *amicus curiae*, urging affirmance.

Initially the District Attorney, in confessing error, took the position that Petitioner should only be granted a new trial. At oral argument in the Supreme Court of Pennsylvania, he stated that on further thorough review of the record and reflection, he had concluded that the misconduct was the worst encountered in his substantial professional experience, and that Petitioner could not obtain a fair trial.

testimony of witnesses so coerced as the principal Commonwealth witnesses could never be "uncoerced" so as to ensure a future fair trial, but that considerations of due process and double jeopardy barred reprosecution in the face of such egregious misconduct.

REASONS FOR GRANTING THE WRIT

The holding of the Supreme Court of Pennsylvania that a new trial is adequate relief for prosecutorial conduct outside the restraints of "the very essence of a scheme of ordered liberty," *Palko* v. *Connecticut*, 302 U.S. 319, 325 (1937), and indeed as extreme as any in recent legal literature, presents important issues of Due Process and Double Jeopardy, which go to the very integrity of the judicial process. It conflicts with controlling authority of this Court and other appellate courts. This case is an appropriate occasion for this Court to address the circumstances and standards under which the dismissal of an indictment may be required in response to flagrant governmental misconduct.

1. Some forty-four years ago this Court definitively and unanimously settled, in *Brown* v. *Mississippi*, 297 U.S. 278, 286 (1936), that a State may not rely upon evidence obtained by violence, and that:

> "It would be difficult to conceive of methods more revolting to the sense of justice than those taken to procure the confessions of these petitioners, and the use of the confessions thus obtained as the basis for conviction and sentence was a clear denial of due process."

Coercing witnesses by lurid descriptions of burning flesh and the electric chair and unusual, illegal prom-

ises of lenity, may be distinguished only in that the egregious, shocking coercion is in the form of threats of violence, rather than their ultimate physical consummation—a distinction the law hardly could endorse. Considering how clearly and how long abhorrence to coercion of witnesses has been a settled part of concepts of Due Process of Law, Petitioner submits that such violations of accepted standards of civilized conduct, even standing alone, required a dismissal of the indictment, and not merely giving a second chance to the prosecutor.

The other misconduct as well as the direct coercion, was repeated and wilful, and represented obvious violations of long-settled standards applicable to prosecutorial conduct in every respect. Each of the improper activities was one condemned by settled judicial precedent or canons of the legal profession—vouching for the truthfulness of witnesses,[8] interfering with defense access to witnesses,[9] eliciting evidence of and commenting in argument upon, uncharged crimes and otherwise

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[8] *E.g.*, American Bar Association Code of Professional Responsibility, DR 7-106(c)(4) ("In appearing in his professional capacity before a tribunal, a lawyer shall not . . . [a]ssert his personal opinion . . . as to the credibility of a witness . . . or as to the guilt or innocence of an accused"); ABA Project on Standards for Criminal Justice, Standards Relating To the Prosecution Function and the Defense Function § 5.8(b) (1971):

> "It is unprofessional conduct for the prosecutor to express his personal belief or opinion as to the truth or falsity of any testimony or the guilt of the defendant."

Greenberg v. *United States*, 280 F.2d 472, 475 (1st Cir. 1960); *United States* v. *Ludwig*, 508 F.2d 140, 142-143 (10th Cir. 1974).

[9] *E.g.*, *Gregory* v. *United States*, 369 F.2d 185, 188 (D.C. Cir. 1966), *cert. denied*, 396 U.S. 865 (1969); *Coppolino* v. *Helpern*, 266 F. Supp. 930, 935 (S.D.N.Y. 1967); *Lewis* v. *Court of Common Pleas of Lebanon County*, 436 Pa. 296, 260 A.2d 184 (1969).

inflaming the passions of the jury,[10] and falsely portraying himself as a neutral who represented the jurors.[11] There was here a wholesale departure from the due process limitation that the prosecutor, as "the servant of the law . . . while he may strike hard blows, he is not at liberty to strike foul ones." *Berger* v. *United States,* 295 U.S. 78, 88 (1935).

Two separate considerations compel a dismissal on due process grounds: First, coerced evidence is "illusory and deceptive evidence." *Payne* v. *Arkansas,* 356 U.S. 560, 568 n. 15 (1958). A trial is not a search for truth if such evidence may be used. Contrary to the view of the court below, it is too much to believe that the same witnesses could ever be free of the impact of the prosecutor's description of burning flesh to them, and of their own prior tainted testimony which the coercion produced. Second, the stream of justice has been polluted, and the remedy of the court below is inadequate to eradicate that pollution and to enforce minimal standards of civilized conduct.

The ruling below conflicts with decisions in numerous other jurisdictions, including the Federal appellate court which sits in Pennsylvania, which have found severe, wilful prosecutorial misconduct to require dismissal of criminal proceedings. Those decisions, in contrast to the ruling below, give effect to this Court's recognition in *United States* v. *Russell,* 411 U.S. 423,

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[10] *E.g., Virgin Islands* v. *Toto,* 529 F.2d 278, 283 (3d Cir. 1976); *United States* v. *LaBarbera,* 581 F.2d 107, 109 (5th Cir. 1978); *Commonwealth* v. *Collins,* 462 Pa. 495, 341 A.2d 492 (1975).

[11] *Steele* v. *United States,* 222 F.2d 628, 631 (5th Cir. 1955), *cert. denied,* 355 U.S. 828 (1957) (prosecuting attorney purported to link himself and jury on same side of case); *Greenberg* v. *United States,* 280 F.2d 472, 474 (1st Cir. 1960).

431-32 (1973), that situations may arise "in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction, cf. *Rochin* v. *California,* 342 U.S. 165 (1952) . . . ." *See, e.g., United States* v. *Morrison,* 602 F.2d 529, 533 (3d Cir. 1979) ("thoroughly unjustified and wrongly motivated interference [of government agents] with the attorney-client relationship" requires dismissal as "the only appropriate relief"); *United States* v. *McCord,* 509 F.2d 334, 349 (D.C. Cir. 1974), *cert. denied,* 421 U.S. 930 (1975); *United States* v. *Butler,* 567 F.2d 885, 892-893 (9th Cir. 1978) (concurring opinion); *United States* v. *Banks,* 383 F. Supp. 389, 392, 397 (D.S.D. 1974), *appeal dismissed sub nom., United States* v. *Means,* 513 F.2d 1329 (8th Cir. 1975); *United States* v. *Russo,* Crim. No. 9373 (C.D. Cal. 1973) (not officially reported) (indictments of Ellsberg and Russo dismissed because government agents burglarized office of Ellsberg's psychiatrist).

2. This Court has declared repeatedly that the Double Jeopardy Clause bars retrials after a reversed conviction occasioned by prosecutorial bad faith or harassment of the defendant. *Arizona* v. *Washington,* 434 U.S. 497, 508-509 (1978); *Lee* v. *United States,* 432 U.S. 23, 33 (1977); *United States* v. *Dinitz,* 424 U.S. 600, 611 (1976); *United States* v. *Jorn,* 400 U.S. 470, 484-485 (1971); *see also United States* v. *Garza,* 603 F.2d 578, 580 (5th Cir. 1979).[12] This Court has not previously had occasion, in a concrete context, to define

[12] The standards of the Double Jeopardy Clause of the Fifth Amendment are of course applied to a State Court proceeding through the Due Process Clause of the Fourteenth Amendment. *Benton* v. *Maryland,* 395 U.S. 784, 793-796 (1969).

the scope of that rule or to identity the kinds of conduct that fall with it. The case at bar presents an appropriate and, Petitioner submits, compelling occasion to give the rule substance and integrity.

The only response of the Supreme Court of Pennsylvania to Petitioner's contention that reprosecution was barred by double jeopardy was incorrectly to suggest (App. B., pp. 10a-11a) that no timely motion for a mistrial had been made. As set forth above in the Statement, the objections to various incidents of misconduct were made in virtually every conceivable form: applications to disqualify the prosecutor, motions to preclude or strike coerced testimony, and for a mistrial (at the end of the opening statement); by demurrer, seeking dismissal; by motion for directed verdict; and by post-trial motions covering the gamut of misconduct. The mistrial motion was timely under prior Pennsylvania Supreme Court precedent, *see* n. 5, supra. The demurrer and motion for directed verdict squarely raised the contention that the proceeding had to be aborted because of prosecutorial misconduct, the touchstone for application of the Double Jeopardy Clause.[13]

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[13] Among the principal instances of misconduct were ones not strictly within the category of trial error calling for a mistrial motion. Thus, the pretrial coercion of witnesses very appropriately was raised here, first by two pretrial motions, then by efforts to exclude or strike the testimony, then by demurrer or dispositive motions. To refuse to apply the Double Jeopardy Clause teachings of this Court to the four-times raised coercion issue because the form in which it was raised was not *per se* a mistrial motion, would be improper.

Petitioner readily acknowledges that a few of the numbing array of improper actions by the prosecutor now attacked were not objected to at trial. These included the eliciting of evidence of crimes not charged and repetition of vouching for witnesses (the first instance of which was objected to strenuously but to no avail). But such concerted misconduct puts defense counsel in an impos-

In all events, a court should not fail to apply the strongest possible antidote to such misconduct even in the absence of objection; it was the Court's duty "to maintain respect for law; . . . to promote confidence in the administration of justice; . . . [and] to preserve the judicial process from contamination," *Olmstead* v. *United States,* 277 U.S. 438, 484 (1928) (Brandeis, J., dissenting).

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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June 1980

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sible situation, for repeated objections may only underscore the prosecutor's improper actions or remarks in the minds of the jurors. *United States* v. *Grunberger,* 431 F.2d 1062, 1068-1069 (2d Cir. 1970). It must be stressed that most of the misconduct was objected to loudly and clearly, and it is inappropriate for a court to put on the blinders to a usurpation of justice for highly technical reasons. Moreover, the errors were so severe that they were incurable upon objection. And, when the District Attorney confessed error to the massive misconduct, any waiver objections were themselves waived.

APPENDIX

APPENDIX A

SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

Nos. 561 & 582 January Term, 1977

(C.P. Criminal, Berks County, at Nos. 213 and 213(a) of 1975)

COMMONWEALTH OF PENNSYLVANIA

v.

STUART RICHARD COHEN, *Appellant*

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court, pursuant to Pa. Rule of Criminal Procedure 312(a), venue is changed to the Court of Common Pleas of Lackawanna County, 45th Judicial District; judgment of sentence is vacated and case remanded with instructions.

BY THE COURT:

/s/ SALLY MRVOS
Sally Mrvos, Esquire
Prothonotary

Dated: April 30, 1980.

APPENDIX B

IN THE SUPPEME COURT OF PENNSYLVANIA
EASTERN DISTRICT

Nos. 561 & 582 January Term, 1977

COMMONWEALTH OF PENNSYLVANIA

v.

STUART RICHARD COHEN, *Appellant*

Appeals from the Judgments of Sentence Imposed July 15, 1977 by the Court of Common Pleas of Berks County, Criminal Division, at Nos. 213 and 213(a) of 1975.

OPINION OF THE COURT

Filed: April 30, 1980

ROBERTS, J.

"No right is more fundamental to the American system of justice" than the constitutionally-guaranteed right of an accused to trial by an impartial jury. *Philadelphia Newspapers, Inc.* v. *Jerome,* 478 Pa. 484, 504, 387 A.2d 425, 435 (1978), appeal dismissed, —— U.S. ——, 99 S.Ct. 3104 (1979). See U.S. Const. Amends. VI & XIV; Pa. Const. art. I, § 9. At issue on these appeals is whether pretrial publicity in Berks County denied appellant Stuart Richard Cohen this fundamental right. Unlike the Court of Common Pleas of Berks County, we conclude that the pretrial publicity did prevent appellant from selecting an impartial jury. Accordingly, we vacate the judgments of sentence and remand for a new trial with a change of venue.

I. Procedural History

On November 14, 1974, a man walking along a fire trail in Reading's Egelman Park discovered the body of Steven Warunek, a sixteen year-old Reading youth. Warunek had been shot to death. On November 18, police arrested three eighteen year-old suspects, Anthony Reynolds, George Arms, and appellant, and charged all three with murder. Police also charged appellant with conspiracy to commit murder. Police investigation revealed that appellant hired the other two to kill Warunek in retaliation for threats Warunek made on appellant's life. Warunek allegedly told his fiance, Kerry Young, he would kill appellant, Young's former boyfriend.

The three suspects were committed to the Berks County prison in lieu of $250,000 bail. Soon after arrest, appellant was released when his father posted certificates of deposit and a bank account with the district justice. Neither Arms nor Reynolds, however, was able to post the necessary security and both remained in prison.

At the same time appellant sought a reduction of bail. In mid-December, at the hearing on appellant's request, Assistant District Attorney Murphy objected on the ground that "Mr. Cohen is accused of premeditated contract killing, and there is a distinct possibility that the district attorney's office will be requesting the death penalty in this case. . . ." [1] Appellant's request for a reduction of bail was denied.

A preliminary hearing on the charges against appellant was held late in January, 1975. Testifying against appellant was Jack Geisler, a "witness" to the killing who, in "sobbing" testimony, both admitted his own involvement and claimed appellant had hired Arms and Reynolds to kill the victim. After two days of testimony, appellant was held for action by the grand jury. On March 5, appellant

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[1] Bail Reduction Transcript at 3.

moved to stay grand jury action against him on the ground that he was prejudiced by media publicity concerning recently-charged Jack Geisler.[2] Judge Edenharter, presiding judge in appellant's case, denied appellant's request. The next day the grand jury indicted appellant and later that month appellant entered a plea of not guilty. Trial was set for April 14.

On April 7, appellant filed a number of pre-trial applications, including an application to disqualify the District Attorney and his staff and one for a change of venue. The court continued the trial date and on April 28 began a hearing on the application to disqualify the District Attorney and his staff.[3]

Appellant based his motion to disqualify on the ground that the District Attorney and his staff were behaving like "persecutors and not prosecutors." City Detective

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[2] Geisler was not charged until February 24, approximately one month after appellant's preliminary hearing. Shortly after the Commonwealth charged Geisler, the district justice, at the request of the District Attorney's office, reduced Geisler's bail and then released Geisler on his own recognizance. President Judge Eshelman rescinded Geisler's release almost immediately and ordered Geisler back to prison. In only four days, the incident prompted six lengthy articles in the Reading press and ten radio broadcasts. See Venue Exhibit 18 at 622 (Reading Eagle, 3/2/75); id. at 623 (Eagle, 3/3/75); id. at 624 (Times, 3/3/75); id. at 626-27 (Times, 3/4/75); id. at 628 (Times, 3/4/75); id. at 629 (Eagle, 3/4/75); Venue Exh. 20 at 669 (Station WRAW, 3/2/75); id. (WRAW, 3/3/75); id. at 670 (WRAW, 3/4/75); id. (WRAW, 3/5/75); Venue Exh. 21 at 698 (WEEU, 3/2/75); id at 699 (WEEU, 3/3/75); id. at 700 (WEEU, 3/4/75); id. at 701 (WEEU, 3/4/75); id. at 702 (WEEU, 3/4/75); id. at 703 (WEEU, 3/4/75); id. at 704 (WEEU, 3/5/75).

[3] On the first day of hearings, the court permitted media representatives to remain in the courtroom but ordered the media not to publish testimony until further order of court. The next day, the court rescinded this order, deeming the hearings fully opened as of inception and thus lifting any restriction on publication.

John Halstead testified that during period of interrogation either District Attorney VanHoove or Assistant District Attorney Murphy threatened Commonwealth witness Jack Geisler as well as appellant's co-defendant Reynolds that they would "burn" or would have the opportunity to smell "burning flesh" if they did not provide details of the killing. Police Lieutenant Thomas Hess testified that District Attorney VanHoove expressed his desire to stand beside appellant when the "switch was pulled."

The trial court denied the application to disqualify and from May 1 to May 9 held a hearing on appellant's application for a change of venue. At the hearing, appellant presented copies of Berks County newspaper articles and transcripts of local radio broadcasts which discussed appellant's case.[4] Appellant also presented Dr. Jay Schulman, a professor at Columbia University and member of the National Jury Project, who is an expert on the impact of publicized criminal proceedings on public opinion.[5] Dr.

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[4] Reading has no local television station.

[5] Dr. Schulman has participated in, consulted in, or researched jury selection in over fifty criminal and civil proceedings, including the "Harrisburg 7" case, *United States* v. *Ellsberg, United States* v. *Mitchell and Stans,* the "Wounded Knee" cases, the "Attica" cases, and the Joan Little case.

We note there is nothing in either our case law or the commentary which would suggest that exhibits of newspaper articles and other media broadcasts are the exclusive evidence in support of an application for change of venue. To the contrary, the ABA Standards on Fair Trial and Free Press encourage use of opinion surveys. Standard 8-3.3(b) of the Standards (2d ed. Approved Draft, 1978) expressly provides:

> "In addition to the testimony or affidavits of individuals in the community, which shall not be required as a condition to the granting of a motion for change of venue . . ., qualified public opinion surveys shall be admissible as well as other materials having probative value."

See id., Commentary at p. 18 ("trial courts should be very liberal in the types of testimony and evidence they will consider").

Schulman testified on the results of a public opinion poll he conducted which tested Berks County residents' views on appellant's guilt. Dr. Schulman, four other expert witnesses, and six lay witnesses all expressed an opinion that appellant could not receive a fair trial in Berks County. The Commonwealth opposed the application for a change of venue, but offered no evidence. The court denied appellant's application without opinion or other explanation of record.

Appellant then petitioned this Court for a writ of prohibition or mandamus, "direct[ing] a change of venue . . . , or in the alternative, prohibit[ing] the enforcement of the order denying the change of venue."[6] Simultaneously, appellant requested the court to continue trial. It did so, setting a tentative trial date of July 14, 1975. This Court denied appellant's application for extraordinary relief on July 2. Appellant then applied for and obtained another continuance, the court setting trial for the September, 1975 Term.

On September 2, 1975, before the scheduled date of trial, appellant filed a "Re-Application For Change of Venue." In support of his "Re-Application," appellant presented the results of a second public opinion survey. This survey was conducted on August 22 and 23 by Dr. Robert Buckhout, another member of the National Jury Project. Once again, the Commonwealth, opposing the motion, presented no contrary evidence. The court denied appellant's "Re-Application," again without explanation. Appellant immediately applied for and was denied another continuance. Trial was set for September 8.

Voir dire began Monday, September 8 and lasted two full weeks, through Friday, September 19. In all, 180 per-

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[6] Petition for Writ of Prohibition or Mandamus, *Commonwealth ex rel. Cohen* v. *Judge Edenharter*, No. 431 Misc. Docket 20, at 5.

sons were called in order to select a twelve-member jury and two alternates. The court ordered each juror immediately sequestered upon selection. At the close of voir dire, appellant for the third time requested a change of venue. The trial court denied this request, again without explanation. Trial began the following Monday, September 22.

At trial, the Commonwealth proceeded on its theory that appellant hired Arms and Reynolds to kill the victim Warunek, presenting testimony not only of Jack Geisler and Anthony Reynolds but also of appellant's former girlfriend Kerry Young. In defense, appellant admitted that he spoke with Arms and Reynolds and produced $700 cash as payment. He maintained, however, that he wanted only Warunek to be "scared" and "shoved around" so that Warunek would know people were protecting appellant. Appellant sought to discredit Commonwealth witness Jack Geisler by showing on cross-examination that Geisler had given police and the District Attorney inconsistent statements and that he had previously testified at appellant's preliminary hearing that appellant wanted only to have Warunek "messed up." Appellant also pointed out that, as of appellant's trial, neither Geisler nor Reynolds had been sentenced on their convictions followings their earlier guilty pleas.

The case went to the jury on Wednesday, October 1. That Friday, October 3, the jury returned verdicts of guilty of murder of the third degree and conspiracy to commit murder. Appellant then filed written post-verdict motions for a new trial and in arrest of judgment, which included appellant's claim that the trial court erred in denying a change of venue.

While appellant's motions were pending, Judge Bertolet, presiding judge at co-defendant Arms's separate trial,

granted Arms's motion for a change of venue. In support of his motion for a new trial, appellant relied in part upon Judge Bertolet's ruling in the Arms case.[7]

Judge Edenharter, however, denied all of appellant's post-verdict motions. In his accompanying opinion, Judge Edenharter for the first time sought to explain his orders denying appellant's three pre-trial applications for a change of venue. The court summarily dismissed appellant's principal contention that the pre-trial publicity was "inherently prejudicial," concluding that, unlike the Arms case, there is insufficient evidence that any inflamatory information was widely disseminated at the time of trial. The court also concluded that the jury appellant did select was not affected by the pre-trial publicity.

On July 15, 1977, the court imposed sentence of ten to twenty years imprisonment, costs, and a fine of $15,000 on the murder conviction, as well as a concurrent sentence of five to ten years, costs, and a fine of $10,000 on the conspiracy conviction. These appeals followed.[8]

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[7] In his order of March 22, 1976 granting Arms a change of venue, Judge Bertolet stated that a fair and impartial trial cannot be had in Berks County because of the "massive publicity to date and expected to continue to the time of trial." Judge Bertolet based his determination on newspaper articles offered by appellant and did not rely upon Arms's offer of a public opinion survey Dr. Shulman conducted in connection with the Arms case. We note that this survey, conducted in November of 1975, revealed that 40% of those Berks County residents surveyed could identify Arms, while 79% could identify appellant.

[8] Upon sentencing, the court denied appellant bail pending appeal. Appellant then took a direct appeal to this Court from the judgment imposed on the murder convictions and a separate appeal to the Superior Court from the judgment imposed on the conspiracy conviction. Appellant also immediately petitioned this Court for Supersedeas and Allowance of Bail pending appeal. Thennew District Attorney of Berks County Morrissey "consented" to the petition filed with this Court. On July 15, two members of

II. Discharge Not Appropriate

Before considering whether a motion for a change of venue should have been granted, we must first consider appellant's contention that, in light of improper conduct on the part of the prosecution, appellant must now be discharged. Appellant makes three arguments in support of this relief. First, he contends the prosecution "coerced" certain Commonwealth witnesses with threats of the electric chair and promises of leniency and that without the "coerced" testimony the evidence is insufficient to support

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this Court entered an order reinstating bail in the amount of $250,000 "pending the appeal in this Court." On July 21, 1977, the Superior Court certified appellant's appeal from the judgment on the conspiracy conviction to this Court.

This Court originally heard argument on these appeals in May of 1979. Appellant claimed trial error, including improper venue, as well as prosecutorial misconduct on the part of previous District Attorney VanHoove and his staff requiring discharge. Then-District Attorney Morrissey not only agreed with appellant that a new trial should be granted but also agreed that the previous district attorney's conduct requires discharge. After argument, at the request of President Judge Eshelman of Berks County, Attorney General Biester reviewed the matter and determined the Attorney General should supersede District Attorney Morrissey to ensure the interests of the Commonwealth are adequately protected. In June of 1979, District Attorney Morrissey petitioned this Court for review of the Attorney General's supersession. The Attorney General was granted a stay of consideration. Also granted were the District Attorney's request for a rule to show cause and the Attorney General's request for oral argument. This Court heard argument on supersession in September of 1979. At argument, the Attorney General agreed to an order vacating supersession but permitting the Attorney General leave to file an amicus brief and orally to argue on the Commonwealth's behalf. This Court then heard reargument on the entire matter in December of 1979. Appellant maintained his previous position, as did District Attorney Morrissey. The Attorney General, as amicus, urges there is neither trial error nor prosecutorial misconduct requiring discharge and thus contends that judgments of sentence should be affirmed.

the jury's verdicts. Second, he contends that the many acts of misconduct on the part of the prosecution, including the alleged coercion of certain witnesses, interference with defense access to Commonwealth witnesses, and unfair argument and cross-examination at trial, so denied appellant due process that a discharge is warranted. Third, appellant contends that, under *Commonwealth* v. *Potter,* 478 Pa. 251, 386 A.2d 918 (1978), appellant must now be discharged for what appellant has termed the prosecution's "overwhelming display" of "bad faith." We reject all three arguments.

We cannot agree that there is insufficient evidence to support the jury's verdicts. Corroborated testimony of Commonwealth witnesses supports a jury's conclusion that appellant hired Arms and Reynolds to kill the victim. Although appellant invites this Court in evaluating the sufficiency of the evidence not to consider testimony of Commonwealth witnesses allegedly coerced by the District Attorney, we must decline the invitation. It is not the practice of this Court to "diminish the record" before reviewing the sufficiency of the evidence. "[T]he sufficiency of the evidence must be evaluated upon the *entire trial record.*" *Commonwealth* v. *Tabb,* 417 Pa. 13, 16, 207 A.2d 884, 886 (1965). Accord, *Commonwealth* v. *Kuebler,* 484 Pa. 358, 361 n.*, 399 A.2d 116, 117 n.* (1979); *Commonwealth* v. *Meadows,* 471 Pa. 201, 369 A.2d 1266 (1977).

Nor can we agree with appellant that the alleged prosecutional misconduct here forecloses retrial on a theory that due process has been denied. We cannot accept appellant's claim that a new trial is not a sufficient remedy for the asserted prosecutorial misconduct. Appellant's claim mistakenly rests on an unsupportable assumption that a fair trial cannot be had in the future. Finally, we cannot agree with appellant that *Potter* requires discharge here. *Potter* is a case where prosecutorial misconduct allegedly forced the defendant to request a mistrial. No such

circumstance is present here. Appellant points to nothing on this record establishing that he made any timely request for a mistrial.

III. Record Mandates Change of Venue

"Legal trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper." *Bridges* v. *California,* 314 U.S. 252, 271, 62 S.Ct. 190, 197 (1941). Accordingly, a trial court has an affirmative constitutional obligation to take "strong measures" to assure a fair trial. *Sheppard* v. *Maxwell,* 384 U.S. 333, 362, 86 S. Ct. 1507, 1522 (1966). As our cases repeatedly state, a trial court requested to change venue must exercise a "sound" discretion. *Commonwealth* v. *Casper,* 481 Pa. 143, 150, 392 A.2d 287, 291 (1978).[9]

In exercising sound discretion, the trial court is to consider the following "discrete factors:"

> "whether the pre-trial publicity was, on the one hand, factual and objective, or, on the other hand, consisted of sensational, inflammatory and 'slanted articles demanding conviction,' *United States* v. *Sawyers,* 423 F.2d 1335, 1343 (4th Cir. 1970); whether the pre-trial publicity revealed the existence of the accused's prior criminal record; whether it referred to confessions, admissions or reenactments of the crime by the defendant; and whether such information is the product of reports by the police and prosecutorial officers."

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[9] Accord, *Commonwealth* v. *Richardson,* 476 Pa. 571, 586, 383 A.2d 510, 518 (1978); *Commonwealth* v. *Hoss,* 469 Pa. 195, 199, 364 A.2d 1335, 1337 (1976) (*Hoss II*); *Commonwealth* v. *Kichline,* 468 Pa. 265, 273, 361 A.2d 282, 287 (1976); *Commonwealth* v. *Stoltzfus,* 462 Pa. 43, 52, 337 A.2d 873, 877 (1975); *Commonwealth* v. *Powell,* 459 Pa. 253, 259, 328 A.2d 507, 510 (1974); *Commonwealth* v. *Martinolich,* 456 Pa. 136, 141, 318 A.2d 680, 683 (1974); *Commonwealth* v. *Swanson,* 432 Pa. 293, 299, 248 A.2d 12, 15 (1968).

Commonwealth v. *Casper,* supra, 481 Pa. at 152-53, 392 A.2d at 292 (footnotes omitted). So too, the extent of saturation as well as the possibility that a period of "cooling-off" has occurred must be considered. Id., 481 Pa. at 153-54, 392 A.2d at 292-93. It must also be remembered that

> "[A] motion for change of venue . . . shall be granted whenever it is determined that because of the dissemination of potentially prejudicial material, there is a substantial likelihood that in the absence of such relief, a fair trial cannot be had. This determination may be based on such evidence as qualified public opinion surveys or opinion testimony offered by individuals, or in the court's own evaluation of the nature, frequency, and timing of the material involved. A showing of actual prejudice shall not be required."

ABA Standards Relating to Fair Trial and Free Press, supra, at Std. 8-3.3(c) (2d ed. Approved Draft, 1978).

Moreover, a reviewing court must not simply defer to a trial court's order denying a change of venue. Rather, a reviewing court must very carefully scrutinize such an order to ensure that a sound discretion has been exercised. As the Supreme Court of the United States has made clear, where, as here, the accused's ability to obtain a trial by an impartial jury is called into question, "appellate tribunals have the duty to make an independent evaluation of the circumstances." *Sheppard* v. *Maxwell,* supra, 384 U.S. at 362, 86 S.Ct. at 1522. See *Commonwealth* v. *Pierce,* 451 Pa. 190, 303 A.2d 209 (1973). Here, our review of the record and independent evaluation of the circumstances convince us that prejudicial material was widely disseminated at the time of trial and thus a change of venue is necessary.

A. Dissemination of Prejudicial Material

From appellant's arrest in mid-November, 1974 until hearings in May of 1975 on appellant's first application for a change of venue, Reading's two newspapers the "Times" and the "Eagle,"[10] as well as Reading radio stations WRAW and WEEU, extensively covered every aspect of this case. The record contains thirty-seven newspaper articles, including sixteen front-page stories, and thirty-eight radio broadcasts which directly feature aspects of this case.

Most extensively publicized is the allegation of a "contract killing." The front page of the December 13 Eagle reported Assistant District Attorney Murphy's disclosure that the Commonwealth "may seek the death penalty which, he said, is allowed for premeditated contract killings."[11] The December 14 Times and radio station WRAW also immediately gave similar coverage.[12] Forty-one subsequent newspaper stories, reporting through the May hearings on appellant's application for a change of venue, carried what became standard-reference to the fact that a "contract killing" was involved. These references became so prevalent that subsequent stories referred to the "contract killing" without mentioning that the remarks were made by Assistant District Attorney Murphy at appellant's reduction of bail hearing. One newspaper story even pointed out that "[t]he case is believed to be the first

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[10] The Times and Eagle have a combined daily circulation of 44,994. The Eagle has a Sunday circulation of 46,860.

[11] Venue Exh. 18 at 604.

[12] Venue Exh. 18 at 605 (Times, 12/14/74); Venue Exh. 20 at 666 (WRAW, 12/13/74).

alleged contract killing in Pennsylvania since the Joseph Yablonski murders in 1969." [13]

Also well-publicized were allegations that appellant and the co-conspirators made plans to kill Warunek while "high" on drugs and alcohol. A front-page story of the January Times 25 entitled "Cohen murder hearing begun," accompanied by a 6½ inch by 6¾ inch photograph of appellant and his attorney, summarizes witnesses' allegations that

> "a conspiracy to 'mess up' the 16-year-old Steve E. Warunek was made during a dope and booze party in an apartment at 111 S. 8th St. when the alleged conspirators were 'high' " [14]

The same day the Eagle also carried a story entitled "Killing Linked To Lover's Spat." Accompanying this story, like the story in the Times, is a 5 inch by 6 inch photograph of appellant and his attorney. The story begins:

> "The November slaying of 16-year-old Steve E. Warunek in Egelman Park was depicted Friday as a contract murder, carried out amidst fear of reprisal in a heater lovers' triangle with the conspirators discussing plans during smoke-filled pot and alcohol parties." [15]

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[13] Venue Exh. 18 at 609 (Eagle, 1/25/75). It is noted that three of the persons charged in connection with the Yablonski "contract killings" were granted a change of venue. See *Philadelphia Newspapers, Inc.* v. *Jerome*, 478 Pa. 484, 490, 387 A.2d 425, 428 (1978) (Boyle); *Commonwealth* v. *Pass*, 468 Pa. 36, 44 n.2, 360 A.2d 167, 170 n.2 (1976) (Pass); id., 468 Pa. at 44, 360 A.2d at 170 (Prater).

[14] Venue Exh. 18 at 608.

[15] Id. at 609.

The January 31 and February 2 Eagle, the February 1 and February 4 Times and a January 30 WRAW radio broadcast carried similar reports.[16] Additionally, all but one of the same newspaper articles disclosed that appellant and his former girlfriend had a child out-of-wedlock. Cf. *Commonwealth* v. *Frazier,* 471 Pa. 121, 369 A.2d 1224 (1977) (dissemination of accused's criminal record prejudicial); *Commonwealth* v. *Pierce,* supra (same).

Equally prominent among the subjects of extensive media publicity is the fact that only appellant of the three originally-arrested suspects had the financial capacity to afford pre-trial release on bail. Immediately upon appellant's release, both the November 19 Times and Eagle as well as news broadcasts of WRAW and WEEU made regular reference to the fact that only appellant was free on bail.[17] Reports on the disparity in the suspects' ability to afford pre-trial release appeared in eighteen subsequent newspaper articles and sixteen radio broadcasts.

In reporting on appellant's pre-trial applications, media attributed to appellant "delays" in the proceedings. The April 9 Eagle, in its front-page story "Court grants delay," reported that Assistant District Attorney Murphy "opposed any continuance, claiming that the pretrial relief could be resolved without too much reasonably [sic] delay. However, Judge Frederick Edenharter overruled the objection." The same story commenting on the "delay"

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[16] Venue Exh. 18 at 611 (Eagle, 1/31/75); id. at 614 (Eagle, 2/2/75); id. at 613 (Times, 2/1/75); id. at 615 (Times, 2/4/75); Venue Exh. 20 at 667 (WRAW, 1/30/75).

[17] Venue Exh. 18 at 600 (Eagle, 11/19/74); id. at 601 (Times, 11/19/74); Venue Exh. 20 at 659 (WRAW, 11/18/74); id. at 660 (WRAW, 11/18/74); id. at 661 (WRAW, 11/18/74); Venue Exh. 21 at 682 (WEEU, 11/18/74); id. at 683 (WEEU, 11/18/74); id. at 686 (WEEU, 11/19/74); id. at 687 (WEEU, 11/19/74).

also repeated Murphy's characterization of appellant's "25-page legal document" as "extraordinary and extra-legal." [18] The April 10 Times carried a similar story, entitled "Cohen case delayed a month." [19]

Special media attention centered on appellant's pretrial application to disqualify the District Attorney and his staff.[20] The April 29 Eagle highlighted police testimony concerning District Attorney VanHoove and Assistant District Attorney Murphy:

> "City Detective John Halstead testified that either Mr. VanHoove or Mr. Murphy threatened Jack Geisler, 23-year-old suspect in the case, and another defendant, Anthony Reynolds, 18, during the interrogation periods.
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> During questioning by Atty. Dimitriou, Detective Halstead said that one or the other told the two defendants that 'he would burn' or would have the opportunity to smell burning flesh if they did not provide details in the case.
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> Lt. Thomas P. Hess was called to testify regarding a statement by Mr. VanHoove allegedly made some time in December 1974 or late January 1975. Through

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[18] Venue Exh. 18 at 640.

[19] Id. at 641. See also Venue Exh. 21 at 712 (WEEU, 4/9/75).

[20] The April 28 Eagle carried a story "Press in Closed Hearing" which recited the preliminary order of the court permitting media representatives to remain during the hearings but not permitting the media to publish testimony and evidence until further order of the court. Venue Exh. 18 at 646. See supra note 3. The next day, the April 29 Times carried a front-page story that "Press will fight secrecy—Appeal planned in Cohen case ruling." Venue Exh. 18 at 648. That evening's Eagle, however, carried a story "Cohen Action Opened," reporting both the court's reversal of its previous order not permitting publication until further order of court and the testimony presented at the hearing on appellant's motion to disqualify. Id. at 647.

examination by Atty. Dimitriou, Lt. Hess admitted that Mr. VanHoove made a remark to the effect that he wanted to stand beside Mr. Cohen when they pulled the switch.

Lt. Hess explained that the reference to Cohen was made to a room full of people and was an offhand remark. He didn't remember if it was presented in a joking manner but that it was made in the county detective's office of the DA's headquarters." [21]

By his publicized "pull the switch" remark, VanHoove announced his opinion on appellant's guilt in violation of *Commonwealth* v. *Pierce,* supra.[22] The April 30 Times carried front-page stories, one entitled "Cohen hearing opened to public" and one "Defense claims partiality," both of which further detailed testimony at the hearing on

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[21] Venue Exh. 18 at 647.

[22] In *Pierce,* this Court relied upon sections 1.1 and 2.1 of the ABA Standards Relating to Fair Trial and Free Press (Approved Draft, 1968), which recommend restrictions on disclosures by prosecuting attorneys and law enforcement officers, to set down the following rule:

"[I]n this Commonwealth policemen and members of the staffs of the office of District Attorneys shall not release to the news media; (a) the existence or contents of any statement or confession given by the accused, or his refusal to give a statement or to take tests; (b) prior criminal records of the accused, including arrests and convictions; (c) any inflammatory statements as to the merits of the case, or the character of the accused; (d) the possibility of a plea of guilty; (e) nor shall the authorities deliberately pose the accused for photographs which connect him with the scene of the crime."

Pierce, 451 Pa. at 200, 303 A.2d at 215. Although nothing would indicate that District Attorney VanHoove's "pull the switch" remark concerning the merits was directly released to the news media, still it must be obvious that, by this tactic, the District Attorney accomplished by indirection what *Pierce* directly proscribes.

appellant's application to disqualify. The "Cohen hearing opened to public" story summarized Officer Hess's previous testimony, reported in the April 29 Eagle, that VanHoove wanted to be standing next to Cohen when the "switch was pulled." The "Defense claims partiality" story mentioned the earlier release of Geisler on his own recognizance at the request of the District Attorney, and again discussed testimony of Detective Halstead concerning the "lurid" statements about the electric chair made by the District Attorney.[23]

Berks County media also gave great attention to appellant's pre-trial application for a change of venue. The court began to hear testimony on appellant's application on May 1. The May 2 Times carried a lengthy story entitled "Court ponders trial site plea" which set forth testimony on the qualifications of appellant's expert witness Dr. Jay Schulman.[24] The same day's Eagle carried another extensive story entitled "Survey Allowed in Cohen Case," which discussed the court's ruling allowing appellant to introduce Schulman's expert testimony.[25] Both the May 3 Times and Eagle carried related, extensive stories.[26]

Eight more stories appeared between May 5 to May 9, all of which discussed testimony at the hearing on appellant's application for a change of venue, including "Consultant Queried on Survey Errors,"[27] "Jury researcher calls Berks biased,"[28] " 'Prejudice' Is Probed At Hear-

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[23] Venue Exh. 18 at 649-50.

[24] Id. at 654.

[25] Id. at 653.

[26] Id. at 656.

[27] Venue Exh. 22 at 719 (Eagle, 5/5/75).

[28] Id. at 722 (Times, 5/7/75).

ing,'' [29] ''Prejudice Is Estimated,'' [30] and ''4 rule out fairness.'' [31]

B. Prejudicial Material Pervasively Disseminated at Time of Trial

The record clearly establishes that the repeatedly-disseminated prejudicial material was widespread throughout Berks County at the time of trial. Thus inapposite are those cases in which the allegedly objectionable reports were not particularly widespread.[32] Equally distinguishable are those cases in which the claimed objectionable reports so long preceded jury selection as to allow for a period of ''cooling off.'' [33]

Here in the months between arrest and trial, Berks County residents became increasingly aware of this case. So too, an ever-growing number of residents formed an opinion on the merits. The public opinion poll conducted by Dr. Schulman in March and April of 1975 and admitted into evidence at the May hearing on appellant's first application for a change of venue revealed that, of 804 ran-

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[29] Id. at 723 (Eagle, 5/7/75).

[30] Id. at 725 (Times, 5/8/75).

[31] Id. at 726 (Times, 5/9/75).

[32] See *Commonwealth* v. *Richardson*, 476 Pa. 571, 586-87, 383 A.2d 510, 518 (1978); *Hoss II*, supra, 469 Pa. at 202, 364 A.2d at 1339; *Commonwealth* v. *Nahodil*, 462 Pa. 301, 306, 341 A.2d 91, 93 (1975); *Commonwealth* v. *Hoss*, 445 Pa. 98, 106, 283 A.2d 58, 63 (1971) (*Hoss I*).

[33] See *Commonwealth* v. *Casper*, supra, 481 Pa. at 157, 392 A.2d at 294; *Commonwealth* v. *Richardson*, supra, 476 Pa. at 587, 383 A.2d at 518; *Commonwealth* v. *Kichline*, 468 Pa. 265, 275-76, 361 A.2d 282, 287 (1976); *Commonwealth* v. *Pass*, 468 Pa. 36, 44, 260 A.2d 167, 170 (1976); *Commonwealth* v. *Nahodil*, supra, 462 Pa. at 306, 341 A.2d at 93; *Commonwealth* v. *Stoltzfus*, 462 Pa. 43, 53, 337 A.2d 873, 877-78 (1975); *Commonwealth* v. *Douglas*, 461 Pa. 749, 753, 337 A.2d 860, 862 (1975); *Commonwealth* v. *Dobrelenski*, 460 Pa. 630, 639, 334 A.2d 268, 272 (1975).

domly-selected Berks County registered voters, 65% then were aware of the case. Of those polled, 30% or 242 out of 804 people, expressly conceded they had prejudged appellant guilty. Dr. Buckhout's survey, conducted approximately four months later in late August, revealed a still greater public awareness of this case. Of the 250 people randomly interviewed, 79% were aware of this case, an increase of approximately 15% from the level of awareness found four months earlier. Dr. Buckhout's survey also revealed that 57% of all persons interviewed, or 143 out of 250 people, attributed guilt to appellant.[34] This figure is nearly twice as great as the figure found in the previous poll. These results, unchallenged and undisturbed by the trial court, demonstrate with unquestionable clarity the substantial extent to which pretrial publicity had reached the local population and had influenced its judgment.[35]

Voir dire, conducted in September, about two weeks after Dr. Buckhout's August survey, confirmed the results of Dr. Buckhout's poll. Of the 180 prospective jurors called, eleven were excused on various grounds of hardship and not questioned concerning the merits. Of the 169 persons questioned, 105 stated they held an opinion concerning the merits. Indeed, of these 105 prospective jurors, eighty-nine were excused on the ground that they admitted a "fixed," irrevocable opinion on guilt. Thus, 53% of the

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[34] Dr. Buckhout asked persons polled to rate their belief of appellant's guilt on a scale of "zero" to "ten." One hundred forty-three ascribed more than "zero" guilt. One hundred thirty-eight of the 143, or 55% of all persons interviewed, ascribed to appellant guilt of "five" or greater.

[35] The trial court here in no respect questioned the basic results of the surveys relied upon in text. Instead, the trial court merely questioned Dr. Schulman's estimation, based upon the results of the survey, that as many as 75% to 80% of Berks County residents prejudged appellant guilty. (Nowhere in its opinion does the trial in any respect dispute either the evidence or conclusions of Dr. Buckhout.)

prospective jurors questioned were excused because of prejudgment.[36]

These percentages of persons expressing an opinion on an accused's guilt are unprecedented in our cases. For example, in *Frazier,* supra, this Court held that widespread pre-trial disclosures of the accused's previous convictions as well as police testimony at the preliminary hearing that the accused admitted his own involvement were "inherently prejudicial" and required a change of venue. There, a "majority" of eleven of the thirty-two jurors questioned were challenged for cause by the accused. In addition, five prospective jurors, excused by peremptory challenges, had an opinion on guilt. This Court in *Frazier* concluded on the basis of voir dire that "clearly . . . the news coverage which occurred at the time of and shortly after the homicide was still in the minds of the prospective jurors at the time of trial. *Frazier,* 471 Pa. at 131, 369 A.2d at 1229. Compare *Commonwealth* v. *Casper,* supra (no inherent prejudice where two out of 42 prospective jurors knew of case and couldn't decide case on basis of evidence at trial); *Commonwealth* v. *Stoltzfus,* supra (no inherent prejudice where 31 out of 139 prospective jurors questioned formed fixed opinion); *Hoss I,* supra (no inherent prejudice where

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[36] An additional five persons were stricken for cause on other grounds of prejudgment. One was prejudiced when told appellant could obtain release on $250,000 bail, two when told a "contract killing" is involved, and two when told appellant is Jewish. Opinion of Edenharter, J., Sur Motion for New Trial and in Arrest of Judgment, at 15 n.13.

We note that the pre-trial publicity also affected the jury selected. It required substantial periods of sequestration. The first three jurors, sequestered immediately upon selection, were sequestered a total of 25 days. Twelve of the fourteen jurors and alternates admitted that to some extent they had read about appellant's case. One of the selected jurors admitted that he had formed an opinion. Despite the fact that a majority of prospective jurors admitted they had fixed opinions which could not be set aside,

26 out of 138 jurors questioned had formed opinion). Surely appellant, whose evidence reveals that as many as nearly two-thirds of those jurors questioned had an opinion on guilt, and indeed 53% of those questioned were excused on the ground of an irrevocable prejudgment of the merits, is entitled to no less protection than that afforded in *Frazier*. It therefore must be concluded that the prejudicial material was widespread at the time of trial and that the court abused its discretion in refusing on this record to grant a change of venue.

So too, this record mandates that retrial must be in another venue. Pursuant to Pa. R. Crim. Proc. 312(a), we change venue from the Court of Common Pleas of Berks County, 23rd Judicial District of the Commonwealth of Pennsylvania to the Court of Common Pleas of Lackawanna County, 45th Judicial District of the Commonwealth of Pennsylvania.[37]

Judgments of sentence vacated and case remanded for proceedings consistent with this opinion.

Mr. Justice Nix files an opinion concurring in part and dissenting in part.

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this juror claimed he could set his opinion aside. Voir Dire Trans. at 584. A second juror, selected September 9 and sequestered the full total of twenty-five days, is a self-employed plumber who admitted that service on the jury would pose a "great financial loss" which would affect his judgment. Voir Dire Trans. at 104. A third juror stated he was familiar with the case by way of discussions among prospective jurors. Voir Dire Trans. at 1107.

[37] Because we conclude that a new trial is necessary, we have no occasion to address any of appellant's following claims: (a) that the trial court should have continued the date of trial from September 8; (b) that prosecutorial misconduct requires a new trial; (c) that the court improperly failed to provide appellant pre-trial statements of Commonwealth witnesses.

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

Nos. 561, 583 January Term, 1977

COMMONWEALTH OF PENNSYLVANIA

v.

STUART RICHARD COHEN, *Appellant*

Appeals from the Judgments of Sentence Imposed July 15, 1977 by the Court of Common Pleas of Berks County, Criminal Division, at Nos. 213 and 213(a) of 1975.

CONCURRING AND DISSENTING OPINION

Filed: April 30, 1980

NIX, J.

I am in substantial agreement with the reasoning of the majority in reaching the conclusion that appellant was not entitled to be discharged and that further prosecution for these offenses should not be barred. I also share the position that the prevailing climate in Berks County at the time of appellant's trial precluded the possibility that he could receive a trial by an impartial jury. To remedy this error a new trial must be granted. But the decision of the majority, at this time, to also provide for a retrial outside of Berks County is totally unwarranted.

The trial in this case occurred between September 22 and October 3, 1975. To conclude that the climate remains unchanged today, without the least support for such a judg-

ment, cannot be supported.[1] The appropriate resolution would permit the Berks County court to determine, at least in the first instance, whether at this time appellant could be given a fair trial within that county. I, therefore, dissent to that portion of the mandate of this Court directing a change of venue *sua sponte*.

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[1] The record before us contains only information concerning the climate prevailing in Berks County in 1975. Five years have passed since the trial and without any information concerning the climate today, the majority is ordering a change of venue. Perhaps the climate in 1980 is the same as in 1975, or it is possible that the citizenry's prejudices may be rekindled by a retrial of the appellant. Nonetheless, we have consistently held that "it is black-letter law an appellate court cannot consider anything which is not part of the record in the case," Saint John the Baptist Greek Catholic Church v. Musko, 448 Pa. 132, 162, 291 A.2d 89 (1972), and "[o]nly the facts that appear in this record may be considered by the appellate court." Commonwealth v. Young, 456 Pa. 102, 115, 317 A.2d 258 (1974). Based upon the record, it is inappropriate and premature for us to conclude that a change of venue is warranted. *See, e.g.*, Commonwealth v. Douglas, 461 Pa. 749, 753, 337 A.2d 860, —— (1975). Moreover, at this juncture we do not know whether appellant still desires a change of venue.

APPENDIX C

IN THE COURT OF COMMON PLEAS OF
BERKS COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

Nos. 213, 213a of 1975

COMMONWEALTH OF PENNSYLVANIA

v.

STUART RICHARD COHEN

SENTENCE

No. 213 of 1975

AND Now, this 15th day of July, 1977, the sentence is that the Defendant Stuart Richard Cohen in the above-captioned Criminal Action pay the cost of prosecution, a fine in the sum of $15,000 and be committed to: Bureau of Correction for confinement in a State correctional facility for a period of not less than 10 years nor more than 20 years from date of July 15, 1977.

BY THE COURT,
EDENHARTER, J.

No. 213a of 1975

AND Now, this 15th day of July, 1977, the sentence is that the Defendant Stuart Richard Cohen in the above-captioned Criminal Action pay the cost of prosecution, a fine in the sum of $10,000 and be committed to: Bureau of Correction for confinement in a State correctional facility for a period of not less than 5 years nor more than 10 years from date of July 15, 1977. This sentence shall run concurrently with the sentence imposed at Criminal Action No. 213 of 1975.

BY THE COURT,
EDENHARTER, J.

APPENDIX D

IN THE COURT OF COMMON PLEAS OF BERKS COUNTY
PENNSYLVANIA CRIMINAL DIVISION

Nos. 213, 213a of 1975

COMMONWEALTH OF PENNSYLVANIA

v.

STUART RICHARD COHEN

Sur Motion for New Trial and Arrest of Judgment

ORDER

AND Now, June 23, 1977, motion for new trial and arrest of judgment in the above captioned matter is dismissed.

BY THE COURT,

/s/ FREDERICK EDENHARTER
Judge

APPENDIX E

IN THE COURT OF COMMON PLEAS OF
BERKS COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

Nos. 213, 213a of 1975

COMMONWEALTH OF PENNSYLVANIA

v.

STUART RICHARD COHEN

Sur Motion for New Trial and Arrest of Judgment

ARGUED BEFORE EDENHARTER, J.

OPINION

EDENHARTER, J. June 23, 1977

Defendant, Stuart Richard Cohen, was convicted by a jury of murder in the third degree and conspiracy to commit murder. A motion for a new trial and arrest of judgment was filed and argument was held thereon.

The pertinent evidence viewed most favorably for the Commonwealth revealed that the victim, Stephen (Steven) Warunek, informed one Kerry Young that he would cause bodily harm to Cohen who was her former boyfriend. Young informed Cohen of this threat. On or about October 29, 1974, Cohen was introduced by Richard Wamsher to Jack Geisler, George Arms and Anthony Reynolds at Geisler's apartment in the City of Reading. At that time, Cohen stated in their presence that he would like to have Warunek killed and would pay $500 to $700 to have it done. On or about October 31, 1974 all of them had another meeting at the apartment. Cohen then gave $700 to Wamsher to be paid to Geisler, Arms and Reynolds for the

killing of Warunek. Wamsher paid them the money. Thereafter, on or about November 7, 1974 Geisler, Arms and Reynolds went to the residence of Warunek in the City of Reading. Reynolds lured Warunek to Geisler's truck on the pretense that he had drugs that he wanted to sell to him. Warunek, Arms and Reynolds were then driven by Geisler to an area in or around Engelman's Park in the City of Reading. After arriving at the park, Arms fired a rifle bullet at Warunek which struck him and caused his death. Cohen took the stand. He testified that he did not intend to have Warunek killed but wanted him "off my back". He testified that he gave $700 to Wamsher with instructions that the sum was to be paid to Geisler, Arms and Reynolds after they had gotten Warunek "off my back". Cohen stated that "off my back" meant to "fuck somebody up", to "scare 'em off, threaten him, just get him away from me", and to "shove him around".[1]

Defendant filed a petiton for reduction of bail; application to stay grand jury; application to quash the indictments; application to disqualify the district attorney, the prosecuting attorney and all members of the district attorney staff of Berks County; application for change of venue; application for challenge to the jury array; application for pretrial discovery and inspection; application for bill of particulars; and application for suppression of evidence. Portions of the application for pretrial discovery and inspection, and application for bill of particulars were granted. The application for suppression of evidence was withdrawn. All other pretrial applications were denied. On June 3, 1975 defendant filed a petition for writ of prohibition or mandamus in the Supreme Court requesting, inter

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[1] Geisler entered a plea of guilty to third degree murder, and was sentenced to a term of not less than 6 nor more than 15 years; Reynolds entered a plea of guilty to voluntary manslaughter, and was sentenced to a term of not less than 5 nor more than 10 years; and Arms was convicted by a jury of third degree murder, and post-verdict motions are pending.

alia, a change of venue, disqualification of the district attorney, and discovery and relief prayed for in the challenge to the jury array. On July 2, 1975 the petition for writ of prohibition or mandamus was denied Per Curiam. Commonwealth ex rel. Stuart Richard Cohen v. Judge Frederick Edenharter, et al., Pa. Supreme Ct., 431 Misc. Docket 20.

The post-verdict motions are pervasive and challenge almost every phase of the proceeding from beginning to end. A voluminous record has been produced. The fundamental question is—did defendant receive a fair trial? We will take the issues raised at argument and discuss them in proper sequence.

Grand Jury

Defendant contends that the March 1975 grand jury[2] should have been "stayed" by reason of prejudicial pretrial publicity. First, it should be noted that Pa. R. Crim. P. 203(a) provides: "A defendant who has been held for court or the attorney for the Commonwealth may challenge the array of the grand jury or an individual grand juror. A challenge to the array may be made *only* on the ground that the grand jury was not selected, drawn or summoned substantially in accordance with law." (Emphasis supplied.) It is apparent that the ground upon which defendant relied was not a proper basis to support his challenge. We have supervisory power over a grand jury, but care should be taken in the exercise of supervisory powers not to abridge its function. Pirillo v. Takiff, 462 Pa. 511, 530, 341 A.2d 896, 905, cert. denied, 423 U.S. 1083, 96 S. Ct. 873, 47 L. Ed. 2d 94 (1976). Also, there is a presumption of regularity that attaches to grand jury

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[2] The grand jury was later abolished in Berks County by order of the Court of Common Pleas effective January 5, 1976 pursuant to the provisions of the Act of Oct. 10, 1974, P.L. 713, No. 238 § 1, 17 P.S. § 271 et seq.

proceedings. Commonwealth v. Brownmiller, 141 Pa. Superior Ct. 107, 113, 14 A.2d 907, 910 (1940); Robert Hawthorne, Inc. v. Director of Internal Revenue, 406 F. Supp. 1098, 1115 (E.D. Pa. 1976). And, a strong showing is required to justify any interference with its orderly processes. In re William H. Pflaumer & Sons, Inc., 53 F.R.D. 464, 477 (E.D. Pa. 1976). Defendant failed to establish that the grand jury was subjected to prejudicial pretrial publicity. The petition to stay the grand jury was properly denied for such a stay would have been an unwarranted encroachment on its authority. See In re Grand Jury Proceedings (U.S. Steel-Clairton Works), 525 F.2d 151, 157 (3d Cir. 1975).

Indictments

Defendant contends that the indictments should have been quashed since the grand jurors were subjected to adverse pretrial publicity. A motion to quash an indictment based upon the allegation of "extraneous factors", specifically adverse pretrial publicity, should not be sustained "unless it clearly appears that the defendant has been harmed by some improper conduct that interfered with his substantial rights." Commonwealth v. Evans, 190 Pa. Superior Ct. 179, 197, 154 A.2d 57, 68-9 (1959), aff'd, 399 Pa. 387, 160 A.2d 407 (1960), cert. denied, 364 U.S. 899, 81 S. Ct. 233, 5 L. Ed. 2d 194, rehearing denied, 364 U.S. 939, 81 S. Ct. 377, 5 L. Ed. 2d 371 (1961). There is no indication in the record that the grand jurors were either subjected to or influenced by the pretrial publicity in this case. The application to quash the indictments was properly denied. Accord, U.S. v. Addonizio, 313 F. Supp. 486, 495 (D.N.J. 1970), aff'd, 451 F.2d 49 (3d Cir. 1971), cert. denied, 405 U.S. 1048, 92 S. Ct. 1309, 31 L. Ed. 2d 591 (1972). Also, see Commonwealth v. Douglas, 461 Pa. 749, 753, 337 A.2d 860, 862 (1975); Commonwealth v. Dessus, 214 Pa. Superior Ct. 347, 355, 257 A.2d 867, 871 (1969), allocatur refused sub. nom., U.S. ex rel. Dessus v. Com-

monwealth, 316 F. Supp. 411 (E.D. Pa. 1970); 37 U. Pitt. L. Rev. 12-13.

Defendant asserts that the conspiracy indictment [3] should have been quashed since it failed to state an overt act and was "duplicitious". Pa. R. Crim. Pa. 304(e) provides: "All grounds for relief demanded shall be stated in the [pretrial] application and failure to state a ground shall constitute a waiver thereof." Pa. R. Crim. P. 305 provides: ". . . no pretrial application shall be considered if made less than ten days before a trial unless opportunity therefor did not exist or the defendant or his attorney was not aware of the grounds for the application." No pretrial motion was made to quash the conspiracy indictment on the basis set forth. All grounds for claiming indictments to be defective must be stated in an application to quash and if not stated in such application, are deemed to have been waived. Commonwealth v. Mervin, 63 D. & C. 2d 62, 65 (1973). See Commonwealth v. Ruth, 73 D. & C. 2d 501, 503 (1975). These issues are not properly raised for the first time in post-verdict motions. Even assuming that such claims were properly preserved, they are without merit. The purpose of an indictment is to inform defendant of the charges against him and to protect him against further prosecution for the same cause. Commonwealth v. Petrillo, 338 Pa. 65, 77, 12 A.2d 317, 324 (1940); Commonwealth v. Ackerman, 239 Pa. Superior Ct. 187, 194, 361 A.2d 746,

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[3] The conspiracy indictment (213a) avers: "The Grand Jury of Berks County by this indictment presents that on (or about) October 29, 1974, and October 31, 1974, in or around 111 South 8th Street and/or various other places, City of Reading, in said County, the above defendant did conspire with George Arms, and/or Anthony Reynolds and/or Jack Geisler to commit the crime of murder and did then and there hire the said co-conspirators to murder one Stephen Warunek, which murder was carried out by the said co-conspirators or one or more of them, on or about November 7, 1974, in or around Egelman's Park, City of Reading, in violation of Section 903(a)(1), the Act of December 6, 1972, No. 334 (18 Pa. S. Section 903(a)(1)".

749 (1976); Commonwealth v. Brown, 229 Pa. Superior Ct. 67, 70, 323 A.2d 845, 847 (1974). An indictment charging a conspiracy is sufficient if it follows the language of the statute, contains a sufficient description of the object of the conspiracy, and contains a sufficient statement of an overt act to effect the object of the conspiracy. U.S. v. Gilboy, 160 F. Supp. 442, 451 (M.D. Pa. 1958). See Pa. R. Crim. P. 213. An overt act in a conspiracy is an act which is done openly by one of the co-conspirators to accomplish the purpose of the conspiracy. Commonwealth v. Cohen, 203 Pa. Superior Ct. 34, 63, 199 A.2d 139, 154 (1964), cert. denied, 379 U.S. 902, 85 S. Ct. 191, 13 L. Ed.2d 176 (1964). It is expressly stated in the indictment that defendant did *hire* the said co-conspirators to murder Warunek. This meets the requirement of alleging an overt act for a conspiracy. See Commonwealth v. Petrillo, supra at 90, 12 A.2d at 329.

As a general rule a count in an indictment which joins two or more distinct crimes or offenses is improper on the grounds of duplicity. Commonwealth v. Doran, 145 Pa. Superior Ct. 173, 176, 20 A.2d 815, 816 (1941). The only crime alleged in this indictment is the conspiracy to murder Warunek. The use of the disjunction applies only to the alleged co-conspirators within that conspiracy. Conspiracy by definition involves an agreement between two or more parties to do an unlawful act. Commonwealth v. Stephens, 231 Pa. Superior Ct. 481, 485, 331 A.2d 719, 721 (1974); Act of Dec. 6, 1972, P.L. ——, No. 334 § 1, 18 C.P.S.A. § 903. Whether it is alleged that there were two or ten persons within the conspiratorial framework would not make it more than a single conspiracy.

Disqualification of District Attorney

Defendant contends that the district attorney and his staff should have been "disqualified" by reason of prose-

cutorial misconduct.[4] In Commonwealth v. Toth, 455 Pa. 154, 158-9, 314 A.2d 275, 277-8 (1974) it is stated: "A district attorney holds an office of unusual responsibility, and he must exercise his duties with complete impartiality. . . . 'The district attorney is a quasi-judicial officer. He represents the commonwealth, and the commonwealth demands no victims. It seeks justice only, equal and impartial justice, and it is as much the duty of the district attorney to see no innocent man suffers as it is to see that no guilty man escapes. Hence he should act impartially.' " See Commonwealth v. Tumpson, 242 Pa. Superior Ct. 1, 5, 363 A.2d 1129, 1131 (1976). It is the prosecutor's duty to seek justice, not merely to acquire convictions. Commonwealth v. Gilman, —— Pa. ——, 368 A.2d 253, 257 (1977). Although the district attorney is a quasi-judicial officer whose goal should be discovering the truth, he is also an officer of the Commonwealth obligated to advance the Commonwealth's interests. Commonwealth v. Diana, 455 Pa. 267, 269 n., 314 A.2d 262, 263 n. (1974).

Defendant urges that the district attorney made an improper remark in open court during a pretrial bail reduction hearing when he stated the case involved a "contract killing". In setting pretrial bail, one of the standards which Pa. R. Crim. P. 4004 sets forth for determining bail is "the nature of the offense charged and any mitigating or aggravating factor that may bear upon the likelihood of conviction and possible penalty". The district attorney

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[4] The Act of April 9, 1929, P.L. 177, art. IX, § 907, 71 P.S. § 297 provides, inter alia, that a district attorney may be superseded when the president judge shall request the Attorney General to do so, in writing, setting forth that, in his judgment, the case is a proper one for the Commonwealth's intervention. In Gwinn v. Kane, 465 Pa. 269, 283, 348 A.2d 900, 907 (1975) it is stated: "The purpose of section 907 is to provide for the enforcement of the law when the district attorney, for any reason, is unable or unwilling to conduct prosecutions." In the present case the district attorney was not unable or unwilling to conduct the prosecution.

provided information dealing with this standard which was proper. See Commonwealth v. Herron, —— Pa. Superior Ct. ——, 365 A.2d 871, 873-4 (1976). In addition, defendant alleges the following prosecutorial misconduct: that threats were made by the district attorney and prosecuting attorney toward numerous persons and witnesses to obtain statements from them against defendant in violation of their constitutional rights; that the district attorney and prosecuting attorney illegally reduced the bail of a key Commonwealth witness to solicit favorable testimony from the witness against defendant; and that the Commonwealth failed to bring charges against other persons who testified against defendant in return for their testimony against him. A review of the testimony at the pretrial hearing demonstrates that these allegations were either not established under the evidence, derived from conversations taken from incomplete context, or subject to dispute. The Commonwealth did not show prejudice toward defendant by its failure to bring criminal charges against Commonwealth witnesses. The district attorney has general and widely recognized power to conduct criminal litigation on behalf of the Commonwealth and to decide whether and when to prosecute, and whether and when to discontinue a case. Commonwealth v. DiPasqualae, 431 Pa. 536, 540-1, 246 A.2d 430, 432 (1968). See Commonwealth v. Ragone, 317 Pa. 113, 118, n.1, 176 A. 454, 456, n.1 (1935); Piscanio Appeal, 235 Pa. Superior Ct. 490, 494, 344 A.2d 658, 660 (1975). The claim by defendant that the conduct of the district attorney and his staff violated the dictates of Commonwealth v. Pierce, 451 Pa. 190, 303 A.2d 209 (1973) is without merit.[5] Defendant also relies on Commonwealth

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[5] Pierce held at page 200, 303 A.2d at 215 as follows: ". . . we rule that in this Commonwealth . . . members of the staffs of the office of District Attorneys *shall not release* to news media: (a) the existence or contents of any statement or confession given by the accused, or his refusal to give a statement or to take tests; (b) prior criminal records of the accused including arrests and

v. Vallone, 151 Pa. Superior Ct. 431, 441, 30 A.2d 229, 233 (1943), rev'd on other grounds, 347 Pa. 419, 32 A.2d 889 (1943). Vallone is inapposite.[6] Although we would not condone the alleged behaviour of the district attorney we are aware that the prosecution of crime does not always involve witnesses who are interested in the pursuit of justice. Trial preparation is ever intense and indiscretion remains an ever-present possibility.[7] The issue is not whether the disrtict attorney used inappropriate "barrack's room" language during the course of the investigation. Words are not the quintessence of things. We must look to the overall

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convictions; (c) any inflammatory statements as to the merits of the case, or the character of the accused; (d) the possibility of a plea of guilty; (e) nor shall the authorities deliberately pose the accused for photographs at or near the scene of the crime, or in photographs which connect him with the scene of the crime." (Emphasis supplied.) A review of the record indicates that if the press did report any evidence which could be deemed prejudicial such information was not "released" by the district attorney's office but was elicited in pretrial hearings or during the trial, often by defense counsel.

[6] Vallone held at page 440, 30 A.2d at 233 that it violated fundamental principles of fair play for the district attorney to intimidate a defense witness before he was called to testify by arresting him without charges or without any reasonable justification, and holding him in jail overnight until required by the court to produce him. Such facts are not present in this case.

[7] The district attorney is alleged to have described the electric chair and the smell of "burning flesh" to potential Commonwealth witnesses. It is further alleged that in a private conversation he said this case would not be like a past criminal prosecution, and that he "would be standing right next to Cohen when the switch is pulled." Also, an assistant district attorney is alleged to have said to a potential Commonwealth witness that he was "tired of fooling around with him", and that he wanted to know about this case and if he didn't reveal what he knew that he was "going to knock him on his ass". None of the above statements were made public or to the press by any member of the district attorney's office.

effect that such words have produced. When this is done we are unable to conclude that defendant has been denied due process of law. Did the district attorney overstep the bounds of propriety to such a degree as to require his disqualification? Under the evidence such relief, even if properly pursued, was not warranted. See Commonwealth v. Bolden, (Nos. 85 & 98 March Term, 1976, Pa. Sup. Ct., filed April 28, 1977). Furthermore, it is apparent that defendant seized upon and utilized the said alleged improper conduct as a *central defense stratagem* at trial. In accordance with Pa. R. Crim. P. 1116(a) after the jury was sworn, the attorney for the Commonwealth made an opening statement. The attorney for defendant then made an opening statement which placed the district attorney on trial. Defense counsel stated: ". . . there will be testimony that will reveal absolutely incredible and improper conduct by the district attorney's office and by Mr. Murphy himself." The application to disqualify the district attorney and his staff was properly denied.

Change of Venue

Defendant contends that a change of venue should have been granted in that pretrial publicity created a pattern of deep and bitter prejudice against defendant denying him due process and a fair trial. In Commonwealth v. Hoss (Hoss II), —— Pa. ——, 364 A.2d 1335 (1976) at page 1337 it is stated: "Under the laws of this Commonwealth it has been clearly established that the grant or refusal of a request to change venue rests within the sound discretion of the trial judge. *Commonwealth v. Powell,* 459 Pa. 253, 328 A.2d 507 (1974); *Commonwealth v. Martinolich,* 456 Pa. 136, 318 A.2d 680 (1974) [appeal dismissed, 419 U.S. 1065, 95 S. Ct. 651, 42 L. Ed. 2d 661 (1974)]; *Commonwealth v. Yount,* 455 Pa. 303, 314 A.2d 242 (1974); *Commonwealth v. Hoss,* 445 Pa. 98, 283 A.2d 58 (1971); *Commonwealth v. Swanson,* 432 Pa. 293, 248 A.2d 12 (1968),

cert. denied, 394 U.S. 949, 89 S. Ct. 1287, 22 L. Ed. 2d 483 (1969); *Commonwealth v. Richardson*, 392 Pa. 528, 140 A.2d 828 (1958)." In reviewing a denial of the motion to change venue, the only legitimate inquiry is whether any juror formed a fixed opinion of appellant's guilt or innocence as a result of pretrial publicity. Commonwealth v. Hoss II, supra at 1338; Commonwealth v. Kichline, —— Pa. ——, 361 A.2d 282, 287 (1976). A defendant claiming that his right to a fair trial was abridged has the burden of proving a nexus between pretrial publicity and actual jury prejudice. Commonwealth v. Hoss II, supra at 1338.[8] The totality of the circumstances must be reviewed to determine whether defendant has established identifiable prejudice as a result of the pretrial publicity. Id. at 1339. In Hoss II, the court examined the following factors to decide if the jury was capable of rendering a fair verdict: (1) The record of the voir dire, (2) the length of time between the publicity and the commencement of trial, (3) the degree of saturation of inflammatory and prejudicial publicity, and (4) the measures taken by the trial judge to assure a fair trial. A review of the voir dire establishes that extensive examination was permitted to determine if any opinion held about the case was "fixed", and to make certain that the only evidence to be considered was the evidence presented during the trial. When a prospective

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[8] There are certain situations where as a result of pretrial publicity actual jury prejudice is presumed to exist. The first situation is when the pretrial publicity is very "extensive" and is "highly inflammatory and prejudicial" rather than being a factual account of events reported. Commonwealth v. Hoss II, supra at 1338. A second situation is when the "dignity and objectivity of the court proceedings" are themselves disrupted by the pretrial publicity. Id. at 1338. Thirdly, a situation is when police officers or members of the district attorney's staff make statements or release certain information to the press which heighten in a significant way pretrial publicity prejudicial to defendant. Commonwealth v. Pierce, 451 Pa. 190, 200, 303 A.2d 209, 215 (1973). None of the above situations are present in this case.

juror had a "fixed" opinion a challenge for cause was granted. See Commonwealth v. Nahodil, 462 Pa. 301, 307, 341 A.2d 91, 93 (1975). During the course of voir dire defendant utilized the services of defense counsel and the services of Dr. Jay Schulman, a defense expert in "jury composition" and "jury selection".[9] Significantly, twelve jurors and two alternates were seated without defendant exhausting his 20 peremptory challenges. We entertain no doubt whatsoever that defendant was fully satisfied with the jury as empanelled. See Commonwealth v. Martinolich, supra at 144, 318 A.2d at 685; U.S. v. Green, 373 F. Supp. 149, 153 (E.D. Pa. 1974), aff'd, 505 F. 2d 731, cert. denied, 420 U.S. 978, 95 S. Ct. 1404, 43 L. Ed. 2d 659 (1975).

The length of time between the arrest of defendant and trial was approximately ten months. The court granted five continuances at various stages of the proceedings. Considerable publicity occurred at the time of arrest and when bail was posted. The newspaper accounts were not inflamatory but were factual in nature and traced procedural developments. And, it must be noted, that defendant's own expert witnesses testified that the news accounts were primarily "factual in nature". See Commonwealth v. Martin, 465 Pa. 134, 149, 348 A.2d 391, 399 (1975); Commonwealth v. Hoss I, supra at 105, 283 A.2d at 63.[10] There need

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[9] See Michael J. Saks, "'Scientific' Jury Selection", Psychology Today, Jan. 1976, pp. 48-57.

[10] In a hearing on the application for the disqualification of the district attorney and his staff, the pretrial hearing judge granted defendant's request to have a "closed" hearing and to withhold press releases to avoid publicity. After the hearing was in progress, defendant moved that the above order be withdrawn, permitting the hearing to be "open" and to be reported in the press. Also, defendant conducted a survey in Berks County in an attempt to determine the degree of prejudgment in this case. This survey in itself made more persons aware of the details involved in the case since it involved asking 804 selected citizens of Berks County questions about it. One of the questions asked was: "Have you

be no basic incompatibility in the application of the First and Sixth Amendments separately or in tandem. We must recognize the right of the media to inform the public of crime and the administration of justice.

Now we look at the degree of saturation. Dr. Schulman, also a defense expert on "venue" conducted a survey to determine the extent to which publicity may have stimulated community prejudice against defendant. According to this survey, 65% of the persons surveyed in Berks County were aware of the case, and of these persons 46% of them, or 30% of all persons surveyed, had prejudged the case.[11] Defendant's own expert witness did not estab-

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heard of a case of an 18 year old defendant named Richard Cohen who is charged with first degree murder in killing another teenager in what the prosecutor has called a contract killing?"

[11] Dr. Schulman further offered his "opinion" that the portion of the Berks County population which may have prejudged this case may be as high as 80%. However, he conceded that the above figure was only his "estimate" based on such factors inter alia, as people surveyed claiming not to have prejudged the case but having prejudged on the death penalty, negative attitudes toward Jews and negative attitudes toward people of wealth. No statistical data was introduced showing that 80% of the population of Berks County prejudged this case.

The survey was disparate in methodology. Schulman stated that he conducted his survey by making a "reasonable hypothesis" of the proposition he intended to prove and then he collected data to see if empirical information supported the hypothesis. He stated: "I start with the assumption that there may well be bias in a situation which may make it very difficult for a person to have a fair jury trial. I make the assumption because a venue survey done well is a serious matter, involves expenses, and I would expect that counsel, upon asking for my services and I deciding I want to do it, that there is a reasonable belief on the part of counsel that there is some basis for the assertion or suspicion of substantial prejudice." Schulman stated that his presumption was as follows: "My own presumption, having had some experience with the Central District of Pennsylvania, was that given the publicity I was aware of, there should be some substantial prejudgment in this

lish by his survey that the publicity which this case received surpassed the saturation point.

Finally, it is seen that the measures taken by the trial judge to assure a fair trial were substantial. Each juror when seated was immediately sequestered and the entire jury remained sequestered to isolate them from publicity that occurred during trial. A period of 25 days transpired from the time the first juror was selected until verdicts were returned.[12] Wide latitude was permitted defense counsel during voir dire to determine possible prejudice as a result of pretrial publicity.[13] See Commonwealth v. Hoss

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case." Dr. Richard Christie, an associate of Dr. Schulman who assisted the latter in the survey stated that he did not enter the survey with an "assumption" or "hypothesis" of prejudice or prejudgment within the community but simply reviewed the empirical results of the survey and drew conclusions from them.

[12] Even Dr. Schulman stated that he felt sequestration of a jury is very significant in overcoming group prejudices. He testified: "*The question is whether those 12 people, acting as a group, are able to face their prejudices and deal with them. I have discovered that with sequestered juries that happens a great deal because people have a group life of their own and they have to face each other. Everyone of the cases I have researched which has had a sequestered jury, they have been able to develop exactly the kind of group life and they have been able to face their prejudices and come up with, I think ,an absolutely reasonable and fair judgment. But when jurors have come together and they come together and just come in here and they sort of spend a little bit of time in the jury room, they don't know each other well. They are, by and large, strangers to each other*" (Emphasis supplied.)

[13] Defense counsel argues that the number of challenges for cause granted support Dr. Schulman's "estimate" of prejudgment in Berks County. A review of the 180 jurors called for service during voir dire reveals that: 14 persons were seated as jurors; 1 person was struck for cause since he was prejudiced by the fact defendant's family could raise $250,000 bail; 6 persons were struck because of their unqualified opposition to the death penalty; 29 jurors were struck because of hardship, medical or other personal reasons; 6 jurors were struck by the Commonwealth and 17 jurors

II, supra at 1341. The entire voir dire was individually conducted outside the presence of other prospective jurors in accordance with Pa. R. Crim. P. 1106(e)(1). When several prospective jurors revealed that they had heard about the examination in the jury assembly room, in addition to cautionary instructions previously given to the panel,[14] the trial judge expressly instructed excused veniremen not to discuss the voir dire.[15] Defendant asserts that Arms was

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were struck by defense counsel through use of peremptory challenges; 2 jurors were struck because of prejudice arising by the term "contract killing"; 1 juror was struck because of his testimony under oath; 2 jurors were struck because of anti-semitism; 1 juror was struck because she was prejudiced by the seriousness of the crime involved; 8 jurors were struck by the Commonwealth and 4 by defense counsel because they were prejudiced directly or indirectly by knowledge of a person involved; 35 persons were struck by the Commonwealth because they claimed to have "fixed" opinions; 54 persons were struck by defense counsel because they claimed to have "fixed" opinions. Thus, 49% of the total number of jurors were struck because their opinions were deemed to be "fixed". Of the total number of jurors, 30% were struck for cause by defense counsel because their opinions were "fixed". These statistics do not support Schulman's "estimate" of prejudgment which was as high as 80%. Also, it must be recognized that prospective jurors may be inclined to exaggerate their opinions to avoid lengthy and sequestered jury service in capital cases. See Commonwealth v. McGrew, 37 Erie 139, 167, aff'd 375 Pa. 518, 100 A.2d 467 (1953).

[14] See footnote 35, infra.

[15] Defendant cites Commonwealth v. Frazier, —— Pa. ——, 369 A.2d 1224 (1977) in support of his position for change of venue. Frazier holds at page 1230 as follows: ". . . examination of the pretrial publicity reveals the existence of references to appellant's *prior criminal record*, and also contains quotations of *admissions of guilt* allegedly made by him to police. Furthermore, the record shows that news stories reached the homes of practically every potential juror in the county. Furthermore, the record fails to demonstrate that the effect created by this publicity had faded

granted a change of venue at a subsequent time upon a showing of substantially less prejudicial publicity. However, there is nothing in this record concerning that procedure.[16] A change of venue was not justified.

Jury Array

Defendant challenged the jury array on the ground that the composition of the entire panel was discriminatory on the basis of, inter alia, age, sex, race, religion and geog-

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from the minds of the prospective jurors in four months intervening between the time of the homicide and the trial. In fact, the record shows a high proportion of the prospective jurors interviewed during the voir dire remembered reading such articles. The potential for prejudice created by such publicity therefore remained great at the time the request for change of venue was made, and the trial court abused its discretion in refusing that request." (Emphasis supplied.) Frazier differs significantly from the present case. First, the pretrial publicity in the present case contained no reference to any criminal record of defendant and contained no quotations or confessions of guilt made by defendant to police. Defendant's own expert witnesses conceded that the news articles were primarily factual in nature and not inflammatory. The population of Berks County is roughly three times the size of that in Lebanon County. The statistics of the survey conducted by defendant in Berks County suggest the publicity surrounding the present case did not "reach the homes of practically every potential juror" in Berks County. Much of the publicity surrounding the present case was in fact generated by defense procedures. In Frazier, there was only a four month lapse between the homicide and trial while in the present case there was a lapse of approximately ten months. Finally, defendant in the present case was assisted by defense experts in "jury selection" and a jury was seated without defendant exhausting all his peremptory challenges.

[16] It appears that Arms escaped from Berks County Prison, that his trial took place after the present trial and that a suppression order was violated.

raphy. The legislature has provided a procedure to be followed by third class counties in jury selection.[17] The jury was selected in accordance with law.[18] The "Keyman System" of selecting jurors is not unconstitutional per se, for only after a showing that the jury commissioners and keymen were aware of irrelevant criteria for jury selection such as age, race and political party, coupled with an evidentiary record that such information afforded a basis for the selection or nonselection of jurors, would the invalidation of the jury selection be justified. Commonwealth v. Pass, —— Pa. ——, 360 A.2d 167, 170 (1976); Commonwealth v. Martin, supra at 153-7, 348 A.2d at 401-3. Defendant must establish at least a prima facie case of invidious discrimination in the selection of the jury array before the burden shifts to the Commonwealth to refute the presumption of unconstitutional action. Commonwealth v. Martin, supra at 154, 348 A.2d at 401. The fact that a subjective element is present in the selection process does not by itself make the selection procedure inherently discriminatory. Id. at 156, 348 A.2d at 402. Defendant has not met his burden of showing invidious discrimination. See Commonwealth v. Loccisano, —— Pa. Superior Ct. ——, 366 A.2d 276, 279-80 (1976).

Defendant argues that he was prevented from completely litigating his challenge to the jury array because he was not permitted access to juror questionnaires. Questionnaires were sent to the persons to be called for jury duty, and based on responses to the questions contained therein, names were eliminated from the jury list because

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[17] See Act of May 17, 1939, P.L. 157, § 3.1, added 1972, June 23, P.L. 483, No. 155, § 1, 17 P.S. § 1334.1 et seq.

[18] Electronic processing equipment was utilized for the selection of persons to be called for jury duty from the list of registered voters in Berks County.

of disqualification or excuse.[19] The returned questionnaires were to be kept confidential.[20]

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[19] The following guidelines which were adhered to have been established to aid the Jury Clerk in processing questionnaires: "The Jury Clerk shall deem any persons qualified to serve as a juror unless he or she: 1. Is unable to read, write and understand the English language with a degree of proficiency sufficient to fill out satisfactorily the juror qualification questionnaire. 2. Is unable to speak the English language. 3. Is incapable, by reason of mental or physical infirmity, to render satisfactory jury service. 4. Has a charge pending against him or her for the commission of, or has been convicted in a State or Federal court of record of a crime punishable by imprisonment for more than one year. The Jury Clerk shall find that jury service by the following groups of persons and occupational classes of persons would entail undue hardship or extreme inconvenience to members thereof, and therefore will excuse such persons or classes of persons: 1. All actively practicing attorneys, physicians and dentists. 2. Any person who has served as a grand, traverse, or petit juror in a State or Federal court during the past two years. 3. Sole proprietors of businesses, unable to function without them. 4. All mothers of children under the age of twelve years, who cannot arrange for supervision of the children. 5. Members on active service in the Armed Forces of the United States. 6. Full time members of any police department." A list of persons declared ineligible under the above guidelines to serve as jurors is submitted by the Jury Clerk to the President Judge who then either approves or disapproves the action of the Clerk with respect to the names on the list.

[20] On November 5, 1971, the Board of Judges determined that the persons selected would be sent questionnaires on an approved form and that the returned questionnaires were to be kept confidential. The form sent to prospective jurors includes, inter alia, the following questions: "7. Do you have any physical or mental infirmity impairing your capacity to serve as a juror? _____ If so, describe it fully: _____ Give name and address of attending physician: _____ 8. Have you at any time been convicted of or are you presently under indictment for a State or Federal crime punishable by imprisonment for more than one year? _____ . . . 11. What is the extent of your education? Elementary ____ High School ____ College ____". Defendant cites Commonwealth v. Locke, No. 70-09-1190; 70-10-919; 70-12-2416 (Ct. Com. Pleas, Philadelphia

Pa. R. Crim. P. 310 provides that with the exception of written statements by defendant himself no other discovery or inspection shall be ordered except upon proof by defendant after a hearing of, "exceptional circumstances and compelling reasons". Also, see Commonwealth v. Caplan, 411 Pa. 563, 567, 192 A.2d 894, 896 (1963). Defendant failed to establish "exceptional circumstances and compelling reasons" which would require production to defense counsel of the questionnaires obtained at the expense of Berks County. See Commonwealth v. Galloway, 238 Pa. Superior Ct. 69, 71, 352 A.2d 518, 519 (1975).

Polygraph Tests

Defendant contends that he should have been permitted discovery and inspection of the questions and answers asked of Commonwealth witnesses Reynolds and Geisler at the time they submitted to polygraph tests. In Commonwealth v. Gee, 467 Pa. 123, 132-3, 354 A.2d 875, 879 (1976), it is stated: "As for pre-trial discovery in general, the law in Pennsylvania is clear that, absent 'proof by the defendant, after hearing, of exceptional circumstances and compelling reasons' he may be permitted only 'to inspect and copy or photograph any written confessions and written statements' made by him, and that he is not entitled to 'pretrial discovery or inspection of written statements of witnesses in the possession of the Commonwealth.' Pa. R. Crim. P. 310. See also *Commonwealth ex rel. Specter v. Shiomos*, 457 Pa. 104, 320 A.2d 134 (1974); *Commonwealth v. Stafford*, 450 Pa. 252, 299 A.2d 590 (1973), cert. denied, 412 U.S. 943, 93 S. Ct. 2775, 37 L. Ed. 2d 404 (1973); *Commonwealth v. Turra*, 442 Pa. 192, 275 A.2d 96 (1971)". Defendant failed to produce any evidence showing "excep-

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County 1970) for the proposition that in challenging the jury array, questionnaires completed by prospective jurors were made available to defense counsel to aid him in his defense. However, the questionnaire issue was not discussed or decided in that opinion.

tional circumstances and compelling reasons" which would entitle him to pretrial discovery beyond his own statements. See Commonwealth v. Gee, supra at 133, 354 A.2d at 879.

Defendant also claims that he was entitled to the test results on the ground that the Commonwealth had a duty to produce "exculpatory" evidence. Commonwealth v. Gee, supra at 130, 354 A.2d at 878 cites Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196-7, 10 L. Ed. 2d 215 (1963) for the proposition that " 'the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.' " Even absent a specific request, a prosecutor has the duty to make available to the defense evidence that is truly exculpatory rather than merely favorable. Commonwealth v. Gee, supra at 131, 354 A.2d at 878. However, evidence in possession of the prosecutor cannot be considered exculpatory merely because defendant chooses to call it so. Id. at 131, 354 A.2d at 878. In Gee, defendant requested from the Commonwealth "every test, every result, every interview sheet that was taken in connection with that polygraph test" of defendant. The refusal of the lower court to allow defendant these polygraph test results was affirmed. The court stated: "This evidence (polygraph tests) was exculpatory in the sense that it certainly contained exculpatory statements by appellant, but not in the sense that its denial precluded him from any additional evidence; it did not 'extrinsically' tend to establish innocence or to mitigate guilt." Id. at 132, 354 A.2d at 879. These principles support the denial of the request for release of the results of polygraph tests.[21]

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[21] Polygraph test results would have been of no use to defendant at trial since they are not admissible for any purpose. See Commonwealth v. Gee, supra at 142, 354 A.2d at 883-4; Commonwealth v. Johnson, 441 Pa. 237, 240, 272 A.2d 467, 469 (1971).

Voir Dire

Defendant contends that he was denied the right to propound certain questions on voir dire. In Commonwealth v. Kahley, 467 Pa. 272, 289, 356 A.2d 745, 754 (1976) quoting Commonwealth v. Johnson, 452 Pa. 130, 134-5, 305 A.2d 5, 7 (1973) it is stated: " 'It is well-settled that "the examination of jurors under voir dire is solely for the purpose of securing a competent, fair, impartial and unprejudiced jury. . . . Neither counsel for the defendant nor for the Commonwealth should be permitted to . . . ask direct or hypothetical questions designed to disclose what a juror's present impression or opinion may be or what his attitude or decision will likely be under certain facts which may be developed in the trial of the case. While considerable latitude should be permitted on a voir dire, the inquiry should be strictly confined to disclosing qualifications of a juror and whether a juror has formed a fixed opinion or may be otherwise subject to disqualification for cause." *Commonwealth v. McGrew,* 375 Pa. 518, 525, 100 A.2d 467, 470 (1953). See, *Commonwealth v. Biebighauser,* 450 Pa. 336, 346, 300 A.2d 70, 75 (1973); *Commonwealth v. Hoss,* 445 Pa. 98, 107, 283 A.2d 58, 63, 64 (1971); *Commonwealth v. Swanson,* 432 Pa. 293, 299, 248 A.2d 12, 15 (1968); *Commonwealth v. Lopinson,* 427 Pa. 284, 297-98, 234 A.2d 522, 560-61 (1967). The scope of voir dire examination rests in the sound discretion of the trial judge, see, e.g., *Commonwealth v. Biebighauser,* supra; *Commonwealth v. Lopinson,* supra. . . .' " Also, see Commonwealth v. Futch, —— Pa. ——, 366 A.2d 246, 248 (1976); Commonwealth v. Segers, 460 Pa. 149, 156, 331 A.2d 462, 466 (1975); Commonwealth v. Brown, 228 Pa. Superior Ct. 166, 168, 323 A.2d 281, 282-3 (1974). A review of the questions which were not permitted establishes that no abuse of discretion occurred. See Commonwealth v. Rainey, 242 Pa. Superior Ct. 39, 42-3, 363 A.2d 1148, 1150 (1976).

Defendant argues that he was prevented from fully exploring the effects of pretrial publicity by reason of the

denial of questions Nos. 47, 49-57, 59-61 and 64-65. However, defense counsel was permitted to ask numerous questions exploring the possible effects of pretrial publicity.[22] Defendant claims he was unduly restricted by not being permitted to ask questions Nos. 22, 23, 25-29 and 33 covering ethnic prejudices; questions Nos. 75-81 concerning prosecutorial misconduct; questions Nos. 82-93 dealing with the credibility of witnesses; questions Nos. 97, 103, 112 dealing with prejudice against wealthy people; questions Nos. 99 and 100 dealing with bail; questions Nos. 94, 95 and 104-108 dealing with whether this case would be associated with other prominent murder cases; questions Nos. 113-117 dealing with alleged bias resulting from the pretrial use of the term "hired" or contract" killing; and questions Nos. 124, 125, 128, 130 and 131 dealing with whether the veniremen could be impartial jurors. Questions were permitted to elicit potential ethnic prejudices;[23]

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[22] The court permitted defendant to ask the following questions he submitted dealing with pretrial publicity: 45. Have you heard or read about this case in the newspapers? 46. As a result of what you have read, have you formed an opinion as to the guilt or innocence of Richard Cohen or about the merits of this case? 48. Would you have any difficulty overcoming that opinion that has already been set in your mind? 58. Do you feel that you have been so influenced by what you have heard or read that you cannot render an impartial verdict? 62. Have you heard anyone discuss this case? 63. Have you discussed this case with anybody?

[23] The following questions dealing with ethnic prejudices were permitted: 24. Are you a member of the Ku Klux Klan, the American Independent Party, the American Nazi Party or the John Birch Society? 30. Do you have prejudices against Jewish people? 31. Have you had any dealings or experiences with Jewish people that might make it difficult for you to sit in impartial judgment of this case? 32. Will the fact that the defendant is Jewish effect you in any way in your judgment of this case? 34. Will the fact that the defendant is Jewish make it more difficult for you to render a verdict in his favor than if he were not Jewish?

prosecutorial misconduct;[24] possible prejudice against people of wealth;[25] effect of bail;[26] prejudicial effect of the term "contract killing";[27] whether veniremen could be impartial jurors;[28] and knowledge about prosecution witnesses.[29] In additon, whenever it appeared that a prospec-

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[24] The following question was permitted: 39. Were you satisfied that the persons responsible for the investigation and/or prosecution of the case acted competently and efficiently in handling the case?

[25] The following questions were permitted: 110. Would you be influenced by Cohen's wealth? 111. Would you resent Cohen because of his wealth?

[26] The following questions dealing with bail were permitted: 101. Will you be so influenced by the fact that Richard Cohen's father could raise $250,000 bail for Richard that it creates such an impression on you that you could not be a fair and impartial juror? 102. Would you hold it against Mr. Cohen or be resentful against him by virtue of the fact that he is free on $250,000 bail? 109. Would the fact that Cohen came from a well-to-do family and could post $250,000 bail to make it difficult for you to be a fair and impartial juror?

[27] The following question was permitted: 96. Does the term contract killing create such an image in your mind that you are influenced to a degree that you cannot be a fair and impartial juror?

[28] The following questions were permitted: 48. Would you have any difficulty overcoming the opinion that was already set in your mind? 123. Would you judge this case solely on the evidence before you without any fear of later criticism by your friends, relatives, neighbors or co-workers? 126. Would you judge the case solely on the evidence, without any regard for any personal feelings or suspicions that you may have? 129. If chosen in this case, do you know any reason why you could not sit as an impartial juror? 132. You are not going to give any more weight to the arguments of Mr. Murphy than to mine simply because he has the title "District Attorney," are you?

[29] The following questions were permitted: 20. Are you friendly, associated with or related to anyone in the Prosecutor's office, the Police Department or any law enforcement agencies? (Name members of the D.A. staff.) 98. Do you know the names of the other

tive juror may have been infected with bias, additional questioning was permitted. It is manifest that defendant was not prejudiced by the aforesaid refusal of questions especially when the questions which were allowed dealt with the same basic subject matter. Commonwealth v. Futch, supra at 248; Commonwealth v. Kahley, supra at 289, 356 A.2d at 754.[30]

The refusal to grant defendant's challenges for cause was proper and did not constitute error. Defendant did not exhaust his 20 peremptory challenges.[31] In Commonwealth v. Moore, 462 Pa. 231, 238, 340 A.2d 447, 451 (1975), it is stated: "It is well-settled that when . . . the defense does not exhaust its peremptory challenges, it is harmless error to overrule a challenge for cause which should have been sustained, if the juror is actually excluded by a peremptory challenge. *Commonwealth v. Moon*, 389 Pa. 304, 308, 132 A.2d 224 (1957); *Commonwealth v. McGrew*, 375 Pa. 518, 526, 100 A.2d 467 (1953); *Commonwealth v. Bibalo*, 375 Pa. 257, 265, 100 A.2d 45 (1953)." Also, see Dixon v. Andrew Title and Mfg. Corp., 238 Pa. Superior Ct. 275, 277-8, n.1, 357 A.2d 667, 668, n.1 (1976).

Defendant claims that the trial judge improperly questioned certain prospective jurors on voir dire. In Commonwealth v. McGrew, 37 Erie 139, 167, aff'd, 375 Pa. 518, 100 A.2d 467 (1953) it is stated: ". . . since the demeanor of the juror is of vital importance to the trial judge in

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defendants who the prosecution claims to have participated in this alleged incident? Prospective jurors were shown a list of names which included potential witnesses in order to ascertain if they knew such persons. (Voir Dire Exhibit No. 6.)

[30] Defendant cites no authority and no relevant reason appears to justify questioning of prospective jurors concerning their knowledge of past prominent murder cases.

[31] When the jury and alternates were seated, defendant exercised 17 of the 20 peremptory challenges to which he was entitled.

appraising his qualifications, it is the right and sometimes the duty of the trial judge to interrogate the jurors. *Clark v. Commonwealth,* 123 Pa. 555, 573; *Commonwealth v. Myma,* 278 Pa. 505, 509. This is particularly true in light of the fact that 'The tendency is to exaggerate their opinions, to escape serving in capital cases.' *O'Mara v. Commonwealth,* 75 Pa. 424, 428." Accord, U.S. v. Segul, 534 F. 2d 578, 581 (3d Cir. 1965).[32] Of the 27 named prospective jurors that the trial judge allegedly questioned improperly, three were not questioned by the court. In regard to the remaining 24 veniremen, it is apparent that the dominant purpose of the inquiries was to clarify inconsistent responses, and to "insure they were not exaggerating their opinions to avoid serving on the jury. Furthermore, such questions did not reflect any hositility or prejudice toward defendant. See Commonwealth v. Myma, supra at 510, 123 A. at 487.

Defendant urges that he should have been granted a mistrial on the ground that the trial judge improperly questioned the said prospective jurors Pa. R. Crim. P. 1118(b) provides that a motion for a mistrial shall be made when the event is disclosed. No motion for a mistrial was made during or following the questioning of said prospective jurors. In any event, no legal basis has been shown which would have justified such action.

Defendant also avers that his motion for a mistrial should have been granted in that the trial judge made an improper comment in the presence of a prospective juror. This particular juror was asked a vague and confusing question by defense counsel as to whether she had

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[32] The right of the trial judge to question prospective jurors on voir dire is well recognized. See A.B.A. standards—Trial by Jury, Approved Draft, 1968; § 2.4.

an opinion that Cohen was "involved in some way".[33] An objection by the district attorney was interposed to the form of the question. The trial judge sustained the objection and pointed out that Cohen was involved as the defendant. This statement was clearly made to enable defense counsel to understand the basis upon which the objection was sustained. Defendant's motion for a mistrial was properly denied.[34]

Defendant further contends that the trial judge failed to instruct prospective jurors waiting to be questioned on voir dire to refrain from discussing the case among themselves and with jurors who had already been questioned and

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[33] The testimony to which defense counsel objected is as follows: "By Mr. Dimitriou: Q In other words, do I understand, Mrs. Gilmartin, that you now have an opinion that Mr. Cohen is involved in some way, to some degree, is that correct, or else he wouldn't be here as a defendant? Mr. Murphy: Objection to the form of the question. The Court: The objection is sustained as to the form of the question. Obviously there is some involvement in some way or other, otherwise he wouldn't be here. He is charged. Mr. Dimitriou: Your Honor, I object to the Court's remarks and I ask for a mistrial. The fact that he is a defendant—he cannot be involved in any way. The Court: I didn't say he was involved, he is a defendant, he is part of these proceedings, Mr. Dimitriou. Mr. Dimitriou: That is not the way your remark came out on the record, it is certainly not the way I understood it. The Court: Mr. Dimitriou, he is a defendant, and in that sense, he is a party to the proceeding. Mr. Dimitriou: He may be a party to the proceeding, but the remark of the Court was that he was involved in some way or other. The Court: As a party. He is a party, he is a defendant. Mr. Dimitriou: I am sure, Your Honor, that you may intrepret it in that manner, but certainly any layman wouldn't interpret it in that manner. The Court: Your motion is refused. You may rephrase your question, but it should not be a question which is vague. He is here as a defendant."

[34] In any event, no prejudice resulted to defendant since defendant's subsequent challenge for cause as to this prospective juror was granted on the ground that she had a "fixed" opinion arising from collateral sources. It must also be noted that defendant did not exhaust all of his peremptory challenges.

challenged. The district attorney made the request for this instruction during the course of voir dire which was refused. Defendant made no such request and did not object to the ruling made thereon. Defendant cannot now object. Commonwealth v. Clair, 458 Pa. 418, 422-3, 326 A.2d 272, 274 (1974). Also, it should again be noted, that when it became apparent that several prospective jurors had heard about the examination in the jury assembly room, the trial judge, in addition to the cautionary instructions previously given to the panel, expressly instructed excused veniremen not to discuss the voir dire.[35] We recognize that jurors need

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[35] On September 8, 1975, Judge James W. Bertolet preliminarily instructed the entire jury panel that: "You don't talk with anybody about the case that you may be trying, acting as jurors. You don't talk with anybody about that until it's all over. When it's over, you are free to discuss it whenever you choose, but what went on in the courtroom, not the jury room. But while the case is going on, you don't talk with anybody about it. It would be just as well if you didn't talk with anybody about any of the cases that are likely to come up in this next week or certainly this week, because by your conversation, you may have influenced some which are on it. You might learn what you thought was a piece of valuable information and, if it didn't come out at trial, you might still think it was a piece of valuable information that might influence your decision. That shouldn't be that way. If it's relevant, if it's admissible, it will come out at trial. You shouldn't be influenced by anything outside of the courtroom. Whoever gives you this information that you might get isn't in court to be cross-examined on it as to how they got it, how they learned it, whether it's legal or not, so it's not worth much, not worth anything. It shouldn't be. So, don't talk with anybody about cases either on or may be called this week until they are all decided, until a particular case is decided. Don't talk with anyone involved in the case in which you are a juror. . . . Don't read about the case if you can help it. If you see something in the newspapers about a case in which you are involved or might be involved, see if you can't skip reading about it this week just so you don't get second-hand information. . . . It's hard to say don't listen to the radio about it because you don't know what is going to be on the radio about it until there is. Don't pay any attention to it, don't take it seriously and, as a matter of fact, you shouldn't even discuss

not be free from all pretrial exposure to information about a case. The courts "do not expect a tabula rosa but merely a mind sufficiently conscious of its sworn responsibility and willing to attempt to reach a decision solely on the facts presented. . . ." Commonwealth v. Johnson, supra at 136, 305 A.2d at 8. Given the fact that twelve jurors and two alternates were seated without necessitating defense exhaustion of peremptory challenges, defendant cannot now claim prejudicial error.

Defendant contends that it was error to sustain Commonwealth challenges for cause on account of opposition to the death penalty. A challenge was granted in regard to prospective jurors who stated that they would not return a verdict of death without regard to any evidence that might be developed at trial. This procedure was proper and in accordance with constitutional standards. See Witherspoon v. Ill., 391 U.S. 510, 520-22, 88 S. Ct. 1770, 20 L. Ed. 2d 776 (1968); Bumper v. North Carolina, 391 U.S. 543, 545, 88 S. Ct. 1788, 20 L. Ed. 2d 797 (1968); Commonwealth v. Sullivan, 446 Pa. 419, 433, 286 A.2d 898, 903 (1972). Although it is undisputed that defendant was charged with a capital offense, he was found guilty of murder in the third degree which is not a capital offense. Act of Dec. 6, 1972, P.L. ——, No. 334, § 1, 18 C.P.S.A. § 1103. Exclusion of prospective jurors having conscientious objection to the imposition of the death penalty is not prejudicial error where sentence is imposed by the court and no death sentence can be imposed. Commonwealth v. Rightnour, 435 Pa. 104, 112, 253 A.2d 644, 648 (1969); Commonwealth v. Servey, 434 Pa. 433, 439, 256 A. 2d 469, 471 (1969). Even non-compliance with the Witherspoon standard of jury selection is irrelevant when the death penalty has not been imposed. Commonwealth v. Martin,

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the case with your fellow jurors until it's all over because there is no use in discussing half of it; the second half may change your opinion completely."

supra at 180, 348 A.2d at 405; Commonwealth v. Dukes, 460 Pa. 180, 189-90, 331 A.2d 478, 482 (1975).

Defendant also raises the constitutionality of the Pennsylvania death penalty statute. A person cannot challenge the constitutionality of a statute unless he shows he is adversely or indirectly affected by its operation. White v. City of Philadelphia, 408 Pa. 397, 402, 184 A.2d 266, 269 (1962); Rogan v. Rogan, 63 Luz. L. Reg. 123, 124 (1973). Defendant was not affected by this statute for it applies only to murder in the first degree. See Act of Dec. 6, 1972, P.L. 1482; No. 334, § 1311, added 1974, March 26, P.L. 213, No. 46, § 3, as amended 1974, Dec. 30 P.L. 1052, No. 345, § 1, 18 C.P.S.A. § 1311. He lacks standing to question the constitutionality of the statute. Commonwealth v. Cornish, —— Pa. ——, 370 A.2d 291, 292, n.2 (1977). Also, see U.S. v. Brewer, 363 F. Supp. 606, 608-9 (M.D. Pa. 1973), aff'd, 491 F. 2d 751, cert. denied, 416 U.S. 990, 94 S. Ct. 2399, 40 L. Ed. 2d 768 (1974).

Opening Address

Defendant contends that a mistrial should have been granted by reason of remarks of the district attorney during his opening address. He said: "Needless to say, on behalf of the witnesses which I introduce or which I introduce to you, I am vouching for the truth of what they are saying. I am putting them on the stand because I believe them. *But what I believe is not the evidence in this case. What they testify to is evidence. It is evidence for you to weigh and consider.*" (Emphasis supplied.) He later stated: "As I have indicated, I vouch [for] the truth of the testimony I present and I will thoroughly examine my own witnesses so that you can understand whether they have said something different in the past and their reasons for doing so."[36] Defense counsel did not move for a

[36] In Commonwealth v. Gee, supra at 137, 354 A.2d at 881 it is stated: ". . . as a general rule a party who calls a witness represents him as being worthy of belief. . . ."

mistrial at the time these statements were made and did not so move even at the conclusion of the district attorney's opening address. Only after defense counsel had concluded his opening address was the motion made. Pa. R. Crim. P. 1118(b) provides: "When an event prejudicial to the defendant occurs during trial only the defendant may move for a mistrial; the motion shall be made when the event is disclosed. Otherwise, the trial judge may declare a mistrial only for reasons of manifest necessity." The trial judge properly denied the mistrial motion. See Commonwealth v. Gilman, — —Pa. ——, 368 A.2d 253, 256 (1977). In addition, no objection was made to these statements. Allegations of error at trial will not be considered if they are not specifically objected to when made. Commonwealth v. Clair, supra at 422-3, 326 A.2d at 274. The "waiver doctrine" is explained in Commonwealth v. Smith, 464 Pa. 314, 319, 346 A.2d 757, 759 (1975). No "manifest necessity" existed to justify the trial judge declaring a mistrial especially since the district attorney made it clear that it was for the jury only to determine the credility of the witnesses.

And, even if a timely mistrial motion was made, the statements were harmless. In Commonwealth v. Chandler, 237 Pa. Superior Ct. 19, 24, 346 A.2d 579, 582 (1975), a prosecuting attorney made a comment concerning the credibility of *his* witness during his closing statement. The Superior Court stated: ". . . it is improper conduct on the part of the district attorney to express his opinion as to the credibility of a witness. However, such a comment does not necessarily require reversal and a new trial. A review of the recent cases on this subject would suggest that reversal is mandated only where the comment complained of contains elements clearly inclined to create prejudice or calculated to distract or mislead the jury. See *Commonwealth v. Lipscomb*, 455 Pa. 525, 317 A.2d 205 (1974); *Commonwealth v. Toth*, 455 Pa. 154, 314 A.2d 275 (1974); *Commonwealth v. Revty*, 448 Pa. 512, 295 A.2d 300 (1972);

Commonwealth v. Potter, 445 Pa. 284, 285 A.2d 492 (1971); *Commonwealth v. Shaffer,* 244 Pa. Superior Ct. 564, 307 A.2d 394 (1973). Our Supreme Court has delineated the test for determining when an improper comment constitutes reversible error: 'The language must be such that its "unavoidable effect would be to prejudice the jury, forming in their minds fixed bias and hostility toward the defendant, so that they could not weigh the evidence and render a true verdict." *Commonwealth v. Simon,* 432 Pa. 386, 394, 248 A.2d 289, 292 (1968).' *Commonwealth v. Stolzfus,* —— Pa. ——, 337 A.2d 873, 882 (filed May 13, 1975). . . . The cases that have held that the prejudice arising from the prosecutor's statements demanded reversal, have done so on the basis of fairly strong or abusive language." See Commonwealth v. Eckert, —— Pa. Superior Ct. ——, 368 A.2d 794, 798 (1976). The statements in question were not "strong or abusive". Even if remarks in an opening statement are improper, relief will only be granted where the unavoidable effect is to so prejudice the finders of fact as to render them incapable of objective judgment. Commonwealth v. Farquharson, 467 Pa. 50, 64, 354 A.2d 545, 552 (1976); Commonwealth v. Martin, supra at 294, 336 A.2d at 292. Defense counsel is hardly in a position to complain since he referred to these statements in his opening address, during trial, and in his closing argument. This contention is without merit.

Trial

Defendant alleges "repeated and deliberate misconduct of the prosecutor" during trial. He claims that he was improperly cross-examined concerning crimes for which he was not charged; and that the district attorney improperly suggested before the jury that defendant was obligated to call witnesses made available to him by the Commonwealth. We find no substance in these arguments. Further, defendant failed to raise any objection to the

matters complained of during trial and any alleged errors are waived. Commonwealth v. Clair, supra at 422-3, 326 A.2d at 274.

Defendant further claims that the district attorney argued incompetent evidence as proof on the merits. Defendant did object to the following testimony: "Q Now, Tony, you recounted the events that took place between, I think you said, October 29th or 30th and November 7th, 1974. Did the events which took place during that period of time—have you described them here for us today? Excuse me? Q What you described here today, did it happen? Mr. Dimitriou: I object. The Court: Objection is overruled. The Witness: Yes, they did." The question to this witness was harmless. It was a common "wrap-up" or concluding question which was appropriate at that phase of the direct examination.

Defendant avers that the district attorney erred by introducing numerous witnesses knowing they had previously testified untruthfully. There is no proof that he called any witness to testify knowing that such witness would testify falsely. See Commonwealth v. Carpenter, —— Pa. ——, 372 A.2d 806, 810 (1977); Commonwealth v. Cain, —— Pa. ——, 369 A.2d 1234, 1240 (1977); Commonwealth v. Gaddy, —— Pa. ——, 362 A.2d 217, 222 (1976). When a witness does testify inconsistently on different occasions, defense counsel may attempt to impeach the credibility of the witness by indicating to the jury the inconsistencies in his testimony. This was done. Commonwealth v. Petrakovich, 459 Pa. 511, 525-6, 329 A.2d 844, 851 (1974). Commonwealth v. Ravenell, 448 Pa. 162, 169, 292 A.2d 365, 369 (1974).

Defendant argues that the district attorney deliberately elicited prejudicial testimony on cross-examination beyond the scope of direct examination of witness Halstead. However, when defense counsel specifically objected to the

question as being beyond the scope of direct examination, the objection was sustained.

Defendant moved to prohibit Geisler and Reynolds from testifying on the basis that their testimony was induced and coerced as a result of their guilty pleas and that he was thereby denied due process. Please of guilty were accepted from Geisler and Reynolds with the understanding that they would testify concerning their involvement in the death of Warunek.[37] We find no impropriety in these

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[37] "Plea bargaining" is not improper provided that the parties enter into it voluntarily, knowingly and fully understanding the consequences which follow. Commonwealth v. Zuber, 466 Pa. 453, 457, 353 A.2d 441, 443 (1976). A person's will is not so overborne to make a guilty plea involuntary when the plea is entered into in apprehension of imposition of the dealth penalty after a trial, in hope for a more lenient sentence, or in some situations where police threaten and strike a person after his arrest. See Commonwealth v. Zuber, supra at 460, 353 A.2d at 443; Commonwealth v. Melton, 465 Pa. 529, 539-40, 351 A.2d 221, 226-7 (1976); Commonwealth v. Wright, 232 Pa. Superior Ct. 470, 473, 334 A.2d 766, 768 (1975).

The memo of Geisler's plea bargain is as follows: "In consideration of the defendant's (Geisler's) entry of a plea of guilty to murder generally, and in further consideration of the defendant's agreement to testify on behalf of the Commonwealth of Pennsylvania, in the matter of the Commonwealth vs. Stuart Richard Cohen, regarding his own involvement in the death of one Steven Warunek, the District Attorney's Office in a degree of guilt hearing will recommend to the Court that the degree be determined to be murder in the third degree and thereafter the District Attorney's Office will recommend a sentence of six years to fifteen years, the sentence to be served in a state correctional facility. It is further agreed and understood that in the event the said defendanet shall not so testify, then this plea bargain shall not bind the District Attorney's Office to this stipulation of murder in the third degree, and in the event Defendant does not so testify, the District Attorney's Office shall be entitled, in a degree of guilt hearing, to present such evidence and make recommendation as to any higher degree of guilt as may be warranted under all the evidence, facts and circumstances."

The memo of Reynold's plea bargain is as follows: "In consideration of the defendant's (Reynold's) entry of a plea of guilty

pleas. Defense counsel exercised his right and elicited the circumstances surrounding these pleas on cross-examination to attack credibility. Commonwealth v. Dobrolenski, supra at 641, 334 A.2d at 273; Commonwealth v. Marker, supra, at 478, 331 A.2d at 887.

Did the court err in advising Commonwealth witnesses Geisler, Reynolds, Wamsher, Garber and Sugg of their Fifth Amendment rights within the sight and hearing of the jury? Defendant did not object to any of said witnesses being advised of their Fifth Amendment rights within sight and hearing of the jury. As a result, this issue is not properly preserved for review. See Commonwealth v. Clair, supra at 421-3, 326 A.2d at 274. In any event, this contention is without merit. It has been held to be prejudicial for a prosecutor to call a witness to the stand with foreknowledge that the witness intends to invoke his privilege against self-incrimination. This is said to violate defendant's Sixth Amendment right to confrontation, and to constitute prosecutorial misconduct by encouraging guilt by association in the mind of the jury. See Commonwealth v. Davenport, 453 Pa. 235, 239-40, 308 A.2d 85, 87 (1973); Commonwealth v. DuVal, 453 Pa. 205, 211-2, 307 A.2d 229, 231-2 (1973); Commonwealth v. Terenda, 451 Pa. 116, 120-2, 301 A.2d 625, 628-9 (1973). Here, these witnesses all

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to Voluntary Manslaughter, and to further consideration of the defendant's agreement to testify on behalf of the Commonwealth of Pennsylvania in the matter of the Commonwealth v. Stuart Richard Cohen, as well as in any related criminal prosecution, regarding his own involvement in the death of one Steven Warunek, the District Attorney's Office will recommend a sentence of five years to ten years, the sentence to be served in a state correctional facility. It is further agreed and understood that in the event the said defendant shall not so testify, then this plea bargain shall not bind the District Attorney's Office to this stipulation of Voluntary Manslaughter, and in the event the defendant does not so testify, the District Attorney's Office shall be entitled to present such evidence in support of such higher degree of crime as it may deem supported by the evidence, facts and circumstances."

waived their Fifth Amendment rights, *testified,* and were subject to cross-examination by defendant. Defendant was not prejudiced in any manner.

Did the district attorney interfere with defendant's opportunity to prepare his defense? Absent a showing of exceptional circumstances or compelling reasons, it is improper for the district attorney to instruct an otherwise willing witness not to speak to defense counsel prior to trial. Commonwealth v. Wilder, 461 Pa. 597, 603, 337 A.2d 564, 567 (1975); Lewis v. Court of Common Pleas of Lebanon County, 436 Pa. 296, 303-4, 260 A.2d 184, 188-9 (1969). A review of the record does not establish that the district attorney acted improperly.[38]

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[38] On December 10, 1974, the district attorney sent a memo to "All Turnkeys" which provided: "No individuals, police personnel or private citizens or attorneys or anyone else shall be permitted or allowed to have any conversation with Richard John Abraham unless I personally am present." The above memo was not an instruction to witnesses not to speak to defense counsel prior to trial. Furthermore, the district attorney gave defense counsel a list of all the prospective witnesses he intended to call in the case prior to trial including Richard Abraham. There is nothing in the record to indicate that defense counsel attempted to personally interview Abraham. No pretrial application was made by defendant claiming he was prevented access to prosecution witnesses. During the early stages of the trial, the trial judge instructed the district attorney in the presence of defense counsel as follows: "As I recall the off the record conversation that we had in the retiring room this morning, Mr. Murphy stated that this particular person had been contacted by someone who referred to himself as Dr. Shulman, and Mr. Murphy did not indicate at any time, according to my recollection of the conversation and discussion, that he would in any way prevent defense counsel or your duly authorized representatives from interviewing *any* of the witnesses. Mr. Murphy stated that you were free to conduct such interviews. However, Mr. Murphy was apprehensive that certain of the witnesses may be contacted by unauthorized persons and I believe the thrust of Mr. Murphy's position was that he wanted to make certain that any contact with witnesses was done in a proper and authorized manner and done by defense counsel

Was redirect examination of Phillip Sugg by the district attorney proper? The district attorney on redirect examination queried: "Mr. Sugg, you have before you the statement which you gave me on March 21st, do you not? A Yes. Q Is there anything in that that is inaccurate? A Pardon me? Q Is that statement accurate or inaccurate? A I believe it's accurate. Q Referring to page 2 of the statement, I ask you to read the question and answer which I have pointed out to you in the middle of the page. Mr. Dimitriou: Your Honor, I object."[39] During cross-examination of this witness the statement referred to was attacked by defense counsel as being inaccurate. This redirect examination was appropriate since it developed matters brought out on cross-examination. See Commonwealth v. McDowell, 460 Pa. 474, 481, 333 A.2d 872, 875 (1975).

Was defendant denied a fair trial when the following evidence was introduced? Defendant failed to specifically object to: testimony of witnesses that defendant had been a supplier of and user of unlawful drugs; testimony from

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or his representatives. I believe this was the general thrust of the conversation. However, Mr. Murphy, in accordance with the motion of defense counsel, we agree wholeheartedly that he has free access to *all* witnesses and of course, it is entirely up to the witnesses whether or not they desire to confer with defense counsel or his authorized representatives. Mr. Murphy: Of course. The Court: You understand that, too, that situation, do you not? Mr. Murphy: Yes, I do. The Court: Are you willing to comply with that? Mr. Murphy: Yes, sir. The Court: You are directed to comply with that." (Emphasis supplied.) Abraham was not called as a Commonwealth or defense witness. See Commonwealth v. Sistrunk, 460 Pa. 655, 657-8, 334 A.2d 280, 281 (1975).

[39] When only a general objection is made to the admission of evidence, if the evidence is competent for any purpose, its admissibility is not error. Woldow v. Dever, 374 Pa. 370, 377, 97 A.2d 777, 781 (1953); Commonwealth v. Marshall, 287 Pa. 512, 521, 135 A. 301, 304 (1926); Lenihan v. Davis, 152 Pa. Superior Ct. 47, 50, 31 A.2d 434, 435 (1943).

Geisler that after the homicide, while incarcerated, he had been assaulted by Arms; testimony from Reynolds that he accompanied Arms to the home of Diane Boyers where everyone took drugs, where Arms beat up Gary Haldman and attempted to stab Haldman, and that everyone went to the local high school to sell barbiturates; testimony that Geisler was involved in the murder; testimony from Geisler that Abraham told him that Arms was angry because Arms had received a phone call from defendant threatening to harm Arms, Reynolds and Geisler unless the three kill Warunek; testimony from Wamsher that on Friday, November 8, 1974, Geisler related that Arms had shot Warunek as well as the details of the homicide; and testimony from Sugg that Geisler had come to defendant's home and related to Cohen that Warunek had been killed by a shot in the head. Allegations of error not specifically objected to at trial are deemed waived and need not be considered on review. Commonwealth v. Smith, supra at 319, 346 A.2d at 759; Commonwealth v. Clair, supra at 422-3, 326 A.2d at 274.

Defendant claims error when he was cross-examined relating to his purchase and possession of drugs. The objection was only on the ground that he had already answered the question. The direct examination revealed his involvement with drugs. Defense counsel objected to testimony of Reynolds concerning his plea of guilty on the supposition that his testimony "was something that this witness had been told to say". These specific objections on the grounds set forth were properly overruled. If the ground upon which an objection to evidence is specifically stated, all other reasons for its exclusion are waived and may not be raised thereafter. Commonwealth v. Stoltzfus, supra at 60, 337 A.2d at 881; Commonwealth v. McNeal, 456 Pa. 394, 398, 319 A.2d 669, 672 (1974).

An objection was made to testimony of Geisler that he was "into the conspiracy". Testimony from Reynolds that he had given two previous, less complete, but consistent

statements to the prosecutor was also objected to because "the witness is not responsive to the question", and because the question asked was "vague". These obejctions were sustained. Also, an objection was sustained to the district attorney's request that Halstead explain statements made by Kuzniar. Since these objections were sustained defendant has no valid argument. Defendant claims that it was improper for the district attorney to elicit on cross-examination of him that he failed to support his illegitimate child. However, testimony on this topic was already developed on his direct examination. See Commonwealth v. Cheatham, supra at 202-3, 239 A.2d at 296; Commonwealth v. Sweet, 232 Pa. Superior Ct. 372, 377-8, 335 A.2d 420, 423-4 (1975).

It is also claimed that it was error to permit testimony from Geisler that he pleaded guilty to the murder of Warunek. When testimony was first introduced as to this, no objection was made. Later, objections were made to testimony dealing with the guilty plea based upon the form of the questions. It should be noted that no objection was made on substantive grounds. Defendant is not now in a position to raise this issue. See Commonwealth v. Stoltzfus, supra at 60, 337 A.2d at 881; Commonwealth v. McNeal, supra at 398, 319 A.2d at 672; Commonwealth v. Clair, supra at 422-3, 326 A.2d at 274. Evidence admissible for one purpose but not for another may be admitted, though a limiting instruction must be given *if requested.* Commonwealth v. Davenport, 462 Pa. 543, 556, 342 A.2d 67, 73 (1975); Commonwealth v. Johnson, 457 Pa. 554, 559, 327 A.2d 632, 635 (1974). However, in none of the above situations did defense counsel request cautionary or limiting instructions.

Closing Argument

Was defendant denied due process and a fair trial when the district attorney in his closing argument stated that

Arms was in a mental institution? A prosecuting attorney is limited to making comments based upon the evidence and fair deductions and inferences therefrom. Commonwealth v. Joyner, —— Pa. ——, 365 A.2d 1233, 1236 (1976); Commonwealth v. Revty, supra at 516-17, 295 A.2d at 302; ABA Standards Relating to Prosecution Function, § 5.9. The comment of the district attorney was not based upon evidence introduced at trial. However, in Commonwealth v. Joyner, supra at 1234, it is stated: ". . . not every unwise or unwarranted remark made by counsel . . . in the course of a trial compels the granting of a new trial. *Commonwealth v. Goosby*, 450 Pa. 609, 301 A.2d 673 (1973). 'A new trial is required when the remark is prejudicial; that is, when it is of such a nature or substance or delivered in such a manner that it may reasonably be said to have deprived the defendant of a fair and impartial trial.' " The comment was made on one isolated occasion. It was immediately objected to by defense counsel. The objection was sustained. No mistrial motion was interposed. The trial judge instructed the jury to completely disregard the comment. The district attorney apologized before the jury for making it. Under these circumstances we find no prejudice to defendant. See Commonwealth v. Hoss II, supra at 1343.

No other objection was made to the closing argument, so all other matters raised in regard thereto are waived. Commonwealth v. Clair, supra at 422-3, 326 A.2d at 274.

Charge

Was it error to refuse certain defense requests for instructions? The denial of requests Nos. 2, 3, 4, 5, 6, 7, 8, 10, 15, 17 and 18 was proper since these instructions were adequately covered in the charge. In Commonwealth v. Kahley, supra at 288, 356 A.2d at 753, it is stated: " '. . . the trial court is not required to accept the language of the point submitted by counsel but is free to select its own

form of expression. The only issue is whether the area is adequately and clearly presented to the jury for their consideration.'" Request No. 16 sets forth that if the defendant did not testify, they were not to draw any adverse inference from that fact. However, defendant *did* testify. "A trial court is not obligated to instruct a jury upon legal principles which have no applicability to the presented facts." Commonwealth v. Tervalon, 463 Pa. 581, 593, 345 A.2d 671, 678 (1975); Commonwealth v. Coleman, 402 Pa. 238, 242, 166 A.2d 525, 527 (1961). Request No. 14 relates to the duty of the district attorney to refrain from "improper methods" in the prosecution of a case. Defendant, inter alia, does not delineate "improper methods". The trial judge is not required to grant categorical affirmance where in the exercise of sound discretion it appears that addition information not included in the request is necessary to assist the jury in understanding the issue involved. Commonwealth v. McComb, 462 Pa. 504, 508-9, 341 A.2d 496, 498 (1975). Request No. 19 is in effect a motion for a directed verdict and was refused for reasons set forth hereinafter under the heading of "Directed Verdict".

Was the response to an inquiry by the jury adequate? During the course of its deliberations, the jury submitted the question: "Does the conspiracy to frighten or beat become a conspiracy to commit murder with the death of the victim, even though the death was unintentional? The trial judge then provided the jury with the following additional instruction: "The defendant is charged with the offense of Conspiracy to Commit Murder. Murder has been defined as the unlawful killing of another, with malice aforethought, express or implied. Murder includes an unlawful killing of a human being with malice, but with an intention merely, to inflict grevious bodily harm, and not to take human life, and yet, as a result of the infliction of the injury, death results." Prior to this instruction the following colloquy took place: "Mr. Dimitriou: *I have no objection to the answer that the Court is proposing.* I

only request that the word 'merely' be deleted. . . . The Court: Gentlemen, it should be pointed out that the language that we are employing in response to this question is the language previously used in the instructions of the Court, and we believe that the answer is appropriate under all the circumstances. The request to delete the word 'merely' is refused. . . ." (Emphasis supplied.) After the instruction was given the record reveals: "Mr. Dimitriou: Your Honor, I would ask that in addition, you instruct the jury by 'frighten' or 'beat', it must include—they must find that there was an intention to do grevious bodily injury. . . . I think it is very important that they understand the specific point, and I would respectfully request that you clarify that for them. The Court: Gentlemen, we have reviewed the answer, and the answer does clearly set forth that murder includes an unlawful killing of a human being with malice but with an intention merely to inflict grevious bodily harm. In view of this, it appears that we have set forth the requirement of grevious bodily harm, and under the circumstances, it appears that the answer which has been given is sufficient and that it should be clear to the jury. The request to add to the answer is denied. Mr. Dimitriou: Your Honor, I respectfully—I am not asking you to add. I am asking you to explain to them that 'frighten' or 'beat' *means* grevious bodily harm, so that they can connect it in their minds, so they can relate it. I think it is important that the jury understand that, because apparenly that is an issue that is on their mind. The Court: I believe we have made it clear that the intention must involve the infliction of grevious bodily harm." (Emphasis supplied.) Defendant did not object to this instruction, but requested the trial judge to "explain" the meaning of "frighten" and "beat". The area of law involved was "adequately, accurately and clearly presented to the jury for their consideration." Commonwealth v. Kahley, supra at 288, 356 A.2d at 753; Commonwealth v. Newsome, 462 Pa. 106, 110, 337 A.2d 904, 907 (1975). To

instruct "that 'frighten' or 'beat' *means* grevious bodily harm" would have placed the trial judge in the position of directing an answer to a factual determination which was for the jury. (Emphasis supplied.) Commonwealth v. Davis, 452 Pa. 171, 175, n.6, 305 A.2d 715, 718, n.6 (1973). See Commonwealth v. Russell, 459 Pa. 1, 11, 326 A.2d 303, 308 (1974). Indeed, when we consider the testimony of defendant, to give the requested explanation would be tantamount to a directed verdict of guilty.[40]

Defendant contends that the instructions on conspiracy and malice were erroneous. The charge adequately covered these subjects. Furthermore, no request based upon these alleged claims of error was offered, and no specific objections were made in connection therewith. Pa. R. Crim. P. 1119(a) provides: "Any party may submit to the trial judge written requests for instructions to the jury. Such requests shall be submitted within a reasonable time before closing arguments. . . ." Pa. R. Crim. P. 1119(b) pro-

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[40] Defendant in post-verdict motions avers that the stenographer erroneously did not transcribe his alleged request that "grevious bodily harm" or "serious bodily injury" be defined as set forth in Section 2301 of the Crimes Code. We entertain no doubt that this portion of the record is complete and accurate, and that such averment is without any foundation whatesoever. In any event, defendant has made no objection to the record as it stands. The Act of May 11, 1911, P.L. 279, § 4, 12 P.S. § 1199 provides: "When the evidence in any case is transcribed, it shall be the duty of the official stenographer to lodge the same with the prothonotary or clerk of the court, and notify the parties interested or their counsel that the same will be duly certified and filed, so as to become part of the record, if no objections be made thereto within fifteen days after such notice. . . . If no objections be made . . . said transcript shall be filed of record in the case, and shall be treated as official and part of said record for the purposes of review upon appeal, and shall be considered as prima facie accurate whenever thereafter offered in evidence in the same or any other proceeding. . . ." No objection was made to the accuracy of the transcript.

vides: "No portions of the charge nor omissions therefrom may be assigned as error, unless specific objections are made thereto before the jury retires to deliberate." Failure of defendant to object is a waiver of any alleged errors in the charge. Commonwealth v. Bennett, —— Pa. ——, 370 A.2d 373, 377, n.6 (1977); Commonwealth v. Brown, 467 Pa. 512, 519-20, 359 A.2d 393, 397 (1976); Commonwealth v. Raison, 458 Pa. 378, 379-80, 326 A.2d 284, 284-5 (1974); Commonwealth v. Clair, supra at 421-3, 326 A.2d at 274.

Directed Verdict

Defendant avers that a demurrer should have been sustained. However, "[s]ince . . . the defendant did not rest following his adverse ruling, but elected to put on a case in defense, the correctness of the ruling on the demurrer is no longer an available issue." Commonwealth v. Ilgenfritz, 466 Pa. 345, 347, n., 353 A.2d 387, 388, n. (1976). In ruling upon a motion for a directed verdict, the test is whether a jury could possibly find defendant guilty as charged, after viewing all evidence in a light most favorable to the Commonwealth. All evidence actually received is to be considered without regard for the validity of the evidentiary rulings. Commonwealth v. Brown, 467 Pa. 168, 179, 354 A.2d 898, 903 (1975). When we apply this test, upon a review of the evidence, the jury could find defendant guilty as charged under the indictments.

Verdict

Were the verdicts contrary to the evidence and the weight of the evidence? In considering this issue we must again review the evidence and all reasonable inferences therefrom in a light most favorable to the Commonwealth. Commonwealth v. Dawkins, 227 Pa. Superior Ct. 558, 561, 322 A.2d 715, 716-7 (1974). Whether a verdict is contrary to the evidence or the weight of the evidence so as to

require a new trial is within the discretion of the trial judge. Commonwealth v. Zapata, 447 Pa. 322, 327, 290 A.2d 114, 117 (1972). Commonwealth v. Reese, 237 Pa. Superior Ct. 326, 335-6, 352 A.2d 143, 148 (1976); Commonwealth v. Parsons, 233 Pa. Superior Ct. 419, 423, 335 A.2d 800, 802 (1975). Where evidence is conflicting, the credibility of witnesses is solely for the jury and if its finding is supported by the record, the denial of a motion for a new trial will not be disturbed. Commonwealth v. Zapata, supra at 327, 290 A.2d at 117; Commonwealth v. Reese, supra at 335-6, 352 A.2d at 148, Commonwealth v. Moyer, 232 Pa. Superior Ct. 120, 123, 334 A.2d 764, 765 (1975). Here again, upon a review of the evidence, we find that the verdicts are not contrary to the evidence or to the weight of the evidence. Were the verdicts contrary to the law? "For the verdict to be against the law, it must appear that the verdict is not consistent with any of the alernatives properly left to the jury under the charge of the court." Commonwealth v. Ashford, 227 Pa. Superior Ct. 351, 354-5, 322 A.2d 722, 723 (1974). "A verdict is not against the law if it is not in disobedience to the trial court's instructions." Commonwealth v. Irby, 120 P.L.J. 270, 271, aff'd, 445 Pa. 248, 284 A.2d 738 (1971). The jury found defendant guilty of murder in the third degree and conspiracy to commit murder. These verdicts are consistent with the offenses charged and the evidence produced.

We have considered the issues raised. It is apparent that each step along the way has been subject to challenge. In this process we were required to consider many spurious matters to which no objection or request was ever made. Edmond Cahn, one of the outstanding judicial philosophers of this century said: "For what gives justice its special savor of nobility? Only the divine wrath that arises in us, girds us, and drives us to action whenever an instance of injustice affronts our sight." Knowing this, we conclude that defendant did receive a fair trial, and that his post-verdict motions should be dismissed.

BY THE COURT,

/S/ FREDERICK EDENHARTER
J.

CORRECTED COPY

Supreme Court, U.S.
FILED
AUG 18 1980
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No. 79-2000

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

STUART RICHARD COHEN, *Petitioner,*

v.

COMMONWEALTH OF PENNSYLVANIA, *Respondent.*

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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RESTATEMENT OF QUESTION PRESENTED

Whether the Pennsylvania Supreme Court's granting of a new trial to petitioner was a sufficient remedy for alleged prosecutorial misconduct where allegations of such misconduct were either disputed, not established by the evidence, taken out of context, or, objected to only occasionally or in an untimely fashion, and, did not constitute such overreaching as would warrant dismissal of the charges under the due process and double jeopardy clauses.

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REASONS WHY THE WRIT SHOULD BE DENIED

I. The Record Below Does Not Establish The Egregious Prosecutorial Misconduct Petitioner Alleges.

The petitioner contends that the prosecution committed many acts of misconduct, including the alleged coercion of witnesses, interference with defense access to Commonwealth witnesses, and unfair argument and cross-examination at trial. He claims that the alleged prosecutorial errors were so egregious that the Pennsylvania Supreme Court's reversal of his conviction and the grant of a new trial is not sufficient remedy for these errors, that a complete discharge is warranted. The Commonwealth of Pennsylvania strongly disagrees.

To be sure, the Commonwealth here does not condone some of the prosecutor's language and conduct, but, the transcripts simply do not support petitioner's allegation of such egregious prosecutorial misconduct or

overreaching as would warrant a discharge. Further, petitioner's use of the conclusions of the prosecutor's successor in office, and, his use of — in the finest traditions of advocacy — descriptive adjectives and phraseology cannot change or enlarge what appears in the record below.

A. Pre-trial conduct

In his petition, petitioner points to several sources of prosecutorial misconduct. To begin with he asserts that the District Attorney Robert Van Hoove, and his assistant, the trial prosecutor, John J. Murphy, Jr., had "elicited statements implicating Cohen by *threatening* witnesses with the electric chair and describing it and the smell of burning flesh to them in lurid detail. At least seven witnesses were subjected to this mode of questioning." (Petition, p. 4, emphasis supplied)[1] Petitioner relies on the testimony of Detective John Halstead, the police prosecutor in the case.

Detective Halstead's testimony, reviewed in substantive context, and without words being placed in his mouth by skillful trial counsel, was that the Commonwealth's witnesses were never threatened (Disq. Tr. 91, 92),[2] that they were advised of their constitutional rights, (R. 43a, Disq. Tr. 91, 92),[3] that their liberty was never restrained (Disq. Tr. 92), that they were informed

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[1] "Petition" refers to the Petition For a Writ of Certiorari filed by the counsel for Stuart Richard Cohen on June 18, 1980.

[2] "Disq. Tr." refers to the Transcipt of the Proceedings before the Honorable Frederick Edenharter, Judge of the Court of Common Pleas, Berks County, Pa., on Cohen's Pre-Trial Application to Disqualify the District Attorney, et al.

[3] "R" refers to the Reproduced Record filed in the Supreme Court of Penna.

that they could possibly be charged with 1st degree murder, (R. 43a, 50a), that the penalty for 1st degree murder was death in the electric chair or a life sentence. (R. 43a, Disq. Tr. 91, 92). While it is true that the electric chair was described to them, it must be noted that the Commonwealth's witnesses were less than savory; some were directly involved in the murder of Steven Warunek, some were "hostile", they "weren't too impressed", and that it was thought to be "a big joke". (R. 40a, 42a). The prosecutors had to raise their voices on occasion to impress upon these people the seriousness of the matter. (R. 40a).

The Petitioner also cites the prosecutor's alleged misconduct toward its two key witnesses, Jack Geisler and Anthony Reynolds, during pre-trial interrogation. However, the record shows that Geisler, during vigorous trial cross-examination by Petitioner's counsel, *explicitly denied being threatened* with the electric chair, although he did admit it was described to him. (R. 404a-405a). Detective Halstead also said it was not intended as a threat to Geisler. (Disq. Tr. 93). Witness Reynolds was questioned *in the presence of his two attorneys* at the time the alleged misconduct was to have taken place. (Disq. Tr. 137, 138). In such context, petitioner's allegation of coercion is neither proved nor presumable.

Petitioner further claims that witness Reynolds, as part of his plea bargain, was promised unusually lenient treatment and infers that the prosecutor would be able to carry out these promises because of a meeting with the Judge. The record, however, is devoid of any testimony that such a meeting took place with the Judge. Further, as the trial judge pointed out in footnote 37 of his Opinion, (Appendix E to the Petition, p. 59a), Geisler plead guilty to 3rd degree murder with the

prosecution recommending a six to fifteen year sentence (out of possible 10-20 years); and Reynolds plead guilty to Voluntary Manslaughter with the prosecution recommending a five to ten year sentence. On its face these are not plea agreements of "unusual leniency". These plea agreements were made to obtain the cooperation and testimony of these individuals. As the trial judge held:

> We find no impropriety in these pleas. Defense counsel exercised his right and elicited the circumstances surrounding these pleas on cross-examination to attack credibility . . . . (Petition, Appendix E, p. 59a, 60a).

These plea agreements, therefore, are not evidence of prosecutorial misconduct.

Petitioner next asserts that Commonwealth witness Geisler received other special considerations such as being released from prison without bond and with the prosecutor signing as his surety, and, never being charged with perjury. Although the procedure utilized to obtain Geisler's release from prison on Friday evening, February 28, 1975 was improper, the motivation for the removal was not improper. The witness became uncommunicative and almost hysterical in the prison. The Warden notified the prison physician and then called the prosecutor. The doctor (Pugliese) gave Geisler an injection and testified that being released from prison would benefit Geisler. At that point, Geisler was taken before a magistrate who then released Geisler upon the prosecutor's signing as surety. (Disq. Tr. 160, 162-164, 171).

That Geisler was never charged with perjury although he admitted to not telling the whole truth in the past is not prosecutorial misconduct. Geisler did not

escape prosecution on any charge. He plead guilty to 3rd degree murder. Prosecuting attorneys have wide power to conduct criminal litigation and to decide whether and when to prosecute or terminate a case.[4] Further, there is no proof that the prosecutor called any witness to testify knowing that such witness would testify falsely. Here defense counsel had possession of the witnesses' prior statements and in the exercise of his right properly attempted to impeach the credibility of witnesses by past inconsistent statements. Again, the defendant's right to a fair trial was preserved, and, there was no prosecutorial misconduct.

Next petitioner claims that the District Attorney's Office wilfully impeded defense counsel's interviews of witnesses by instructing turnkeys not to permit imprisoned witnesses to speak with defense counsel. However, the record in the present case contains no evidence that the district attorney instructed a potential witness not to speak to defense counsel prior to trial. All the district attorney did was tell the turnkeys that he wanted to be present when anyone spoke with witness Richard John Abraham. That he wanted to be present is not prosecutorial misconduct.

Further, there is no evidence in the record that the petitioner's counsel or investigators ever made an attempt to speak with Abraham or any other witness prior to trial. Nor did petitioner file a pre-trial application claiming he was denied access to witnesses. Prior to commencement of the trial, petitioner was given a list of potential witnesses, and, early in the trial, the trial judge directed that he have free access to all witnesses. (Trial

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[4] ABA Project on Standards for Criminal Justice, Standards Relating to the Prosecution Function and the Defense Functions § 3.9.

Tr. 54-5).[5] Richard John Abraham, although available to defense counsel, was not called to testify by either the Commonwealth or the defense. Therefore, the petitioner's allegation that the district attorney wilfully impeded defense access to witnesses is simply unsupported in the record.

Petitioner also claims that the district attorney instructed the police prosecutor not to keep daily records, and, that, inferentially, this impeded the defense of his case. Petitioner does not state how this hindered his case, but, the record shows, however, that Detective Halstead was asked by the district attorney not to make police reports or carry copies of statements back to the police department from the district attorney's office on the grounds that there was fear confidential records were being or would be leaked. (Disq. Tr. 74, 93, Trial Tr. 586-87). It had nothing to do with the defendant; the motivation was simply to preserve the confidentiality of the investigation. (Disq. Tr. 93).

B. Trial conduct

The petitioner claims that the prosecutor committed misconduct in opening and closing to the jury, in eliciting evidence of uncharged crimes, and, in cross examining petitioner.

Specifically, petitioner states that in his opening, the prosecutor personally vouched for his witnesses' credibility. While the prosecution did make improper remarks along those lines, nonetheless, the full context of the remarks will show that the prosecutor clearly

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[5] "Trial Tr." refers to the transcipt of the proceedings at trial since the Reproduced Record does not contain all matters that transpired in this case.

stated that what *he* believed was not evidence in the case, that it was for the jury to weigh and consider the testimony, and, it was for the jury to determine whether or not to believe a witness. (R. 326 A). The remarks in context, therefore, were not so strong or abusive that they incited prejudice in the eyes of the jurors. Furthermore, petitioner's counsel failed to timely object to the remarks. He failed to object when they were made as required by Pennsylvania law;[6] rather, he waited until after he had completed his own opening address, during which he vouched for the truthfulness of his witness, the petitioner herein. (Trial Tr. 20, 21). He even went further and called the Commonwealth's witnesses "liars" even though they hadn't yet testified. (Trial Tr. 21). In this context, the prejudicial effect of the Commonwealth's remarks was minimal, if any.

The petitioner next asserts that the prosecutor elicited evidence from Commonwealth witnesses that Cohen was engaged in illegal drug supplying, a crime with which he had never been charged. The prosecutor is also accused of cross-examining petitioner Cohen as to the illegal drug use and his failure to support an illegitimate child. While it is true that the prosecutor asked Commonwealth witnesses about petitioner's involvement of drugs, nonetheless such questions were not prosecutorial misconduct for these were proper to establish the motive and the manner in which Cohen sought to rid himself of the victim, Warunek. Furthermore, Cohen's able trial counsel failed to make any objections to these questions nor were cautionary instructions re-

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[6] Pennsylvania Rule of Criminal Procedure 1118(b) states:

> when an event prejudicial to the defendant occurs during trial only the defendant may move for a mistrial; the motion shall be made when the event is disclosed. Otherwise, the trial judge may declare a mistrial only for reasons of manifest necessity.

quested. In addition, it was Cohen's trial counsel who first made reference to Cohen's drug use when he stated in his opening address to the jury:

> "You'll find that he was and did use drugs in the past. Richard has used drugs." (Trial Tr. 22).

Finally when petitioner took the stand in his defense he readily and repeatedly admitted on direct examination his involvement with drugs, as it pertained to the Warunek murder. (Trial Tr. 590, 593-6, 598, 602-3).

As for the petitioner's failure to support his illegitimate child, again, it was not the Commonwealth that "opened the door", but, rather, it was Cohen's counsel, who, during the testimony of Commonwealth witness, Kerry Young, stipulated that Cohen was the father of Kerry's child (Trial Tr. 81); and in cross-examining her, petitioner's counsel brought up the subject of support for the child when he asked her about Cohen's paying the hospital bills. (Trial Tr. 85). Further, when petitioner Cohen took the stand, he testified on direct that he tried to get money to pay for her hospital bills. (Trial Tr. 591). None of these remarks, therefore, could be labeled prosecutorial misconduct but rather defense trial strategy.

Petitioner makes numerous claims of misconduct as a result of the assistant district attorney's closing speech. But the record shows that petitioner's trial counsel failed to make any objection either during the closing or at the end of it as to those statements which he now claims denied him a fair trial. The Pennsylvania Supreme Court has consistently held that allegatons of basic and fundamental error must be raised in timely and proper fashion or else they are *deemed waived*, and, not considered on appeal. *Commonwealth* v. *Clair*, 458 Pa. 418, 326 A.2d 272, 274 (1974). See also Pa. Rule of

Criminal Procedure, 1118(b), *supra*. In any event, the unobjected to closing remarks of the prosecutor petitioner now claims are egregious prosecutorial misconduct, when viewed in full context, are not prosecutorial overreaching. For example, the prosecutor is accused of expressing his personal belief that Cohen was guilty. (R. 498a). However, the prosecutor never said those words; what he did say was the Cohen was "an accomplice in murder," and, "if it's not first degree murder, I don't know what it is." (R. 498a). Both these statements were nothing more than restatements of the charges in the indictment, and, the prosecutor carefully pointed out to the jury that the trial judge would define and explain the charges "so that you can thereby logically conclude the evidence supports the conclusion he was an accomplice." (R. 498a). Perhaps the phraseology of the prosecutor was not the best, but, it was not intentional or grossly negligent error.

II. Neither The Due Process Nor The Double Jeopardy Clauses Warrant Dismissal Of The Charges.

A. No due process violation

The Pennsylvania Supreme Court ordered petitioner's third degree murder and conspiracy convictions reversed and granted him a new trial on the grounds that the trial court erred in not granting petitioner's request for a change of venue. However, the Court refused to accept petitioner's claim "that the alleged prosecutorial misconduct here forecloses retrial or a theory that due process has been denied." (Petition, Appendix B, p. 10a).

Petitioner had argued to that Court, as he does here, that Commnowealth witnesses could never be un-

coerced, that it is too much to believe that they could ever be free of the alleged prosecutorial misconduct and their own prior tainted testimony. The Supreme Court of Pennsylvania rejected that argument.

This Honorable Court should also reject petitioner's argument and deny the Writ.

First of all, the alleged coercion of the Commonwealth witnesses is vigorously disputed by the record as was pointed out earlier in this brief. Even the trial judge, who heard the testimony on the alleged coercion, noted in his Opinion:

> A review of the testimony at the pre-trial hearing demonstrates that these allegations were either not established under the evidence, derived from conversations taken from incomplete context, or subject to dispute. (Petition, Appendix E. p. 34a).

Secondly, petitioner was protected from any possible injustice by being aware of how the cooperation of the Commonwealth's witnesses was obtained, what their prior statements were, and being able to cross examine each witness in detail on those matters.

Thirdly, the prosecutor's alleged misconduct was the central defense strategy at trial, and, much of the now objected to words and conduct went consistently unobjected to at trial. How can this conduct be so offensive on appeal but acceptable to the petitioner during the course of the trial?

Fourth, the Pennsylvania Supreme Court has held a new trial would be "sufficient remedy for the asserted prosecutorial misconduct." (Petition, Appendix B, p. 10a). Venue will be in Lackawanna County, Pennsylvania; a special prosecutor has been appointed, and the former prosecutor, whose personal involvement and

conduct itself became a major issue at trial, will not be associated with the case.[7]

Fifth, implicit is petitioner's claim that the witnesses cannot now be uncoerced is the assumption that a new jury, which would see and hear the witnesses, which would observe the examination and cross-examination of the witnesses, could not fairly evaluate the credibility of the witnesses and fairly weigh their testimony. Petitioner's argument further assumes that a Court, not having the same opportunity as jury to observe and listen, and, viewing only a cold record, which shows many of his misconduct allegations unsupported or disputed, that such a Court should as a matter of law declare that the witnesses cannot now be uncoerced. The Commonwealth urges this Honorable Court to reject such a notion. As the Pennsylvania Supreme Court held:

> Appellant's (Petitioner's) claim mistakenly rests on an unsupportable assumption that a fair trial cannot be had in the future. (Petition, Appendix B, p. 10a).

B. Decision below not in conflict with decision in other jurisdictions

Petitioner asserts that the ruling of the Pennsylvania Supreme Court "conflicts with decisions in numerous other jurisdictions, including the Federal Appellate court which sits in Pennsylvania. . . ." (Petition, p. 13). The Commonwealth disputes this assertion. First cited as an example of such supposed conflict is *United States* v. *Morrison*, 602 F.2d 529 (3d Cir. 1979). The

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[7] The Acting Attorney General of Pennsylvania, Harvey Bartle III, on June 23, 1980 appointed the District Attorney of Lackawanna County, Ernest D. Preate, Jr., to be a Special Assistant Attorney General for the prosecution of the instant case.

Commonwealth submits that *Morrison* is inapposite to the facts of the instant case. In *Morrison* a three judge panel held that Hazel Morrison's constitutional right to counsel was improperly intruded upon by actions of drug enforcement agency agents when they contacted her out of her counsel's presence, attacked the dedication and competency of her counsel, and attempted to raise doubts in her mind about his effectiveness. Further, since no other relief was available — there being no evidence to suppress or trial to re-try — the Court ordered the indictments dismissed. While it should be noted that the panel's decision in *Morrison* has been severely criticized by at least two other circuit judges, nonetheless, we do not have in Petitioner's case a direct invasion of his right to counsel, nor is there an absence of a sufficient remedy, i.e. re-trial is available here.

Petitioner also cites *United States* v. *McCord*, 509 F.2d 334 (D.C. Cir. 1974), *cert. denied*, 421 U.S. 930 (1975), as being in conflict with the Pennsylvania Supreme Court's decision. In *McCord*, the defendant claims that the prosecution knowingly used perjured testimony against him and engaged in a concented effort to coerce him to plead guilty and to remain silent as to the involvement of high government officials in the authorization of the Watergate breakin. *U.S.* v. *McCord*, *supra*, at 340, 349. Instantly, there is no evidence in the record of such alleged prosecutorial misconduct as charged in *McCord*. Further, in *McCord*, his bid to dismiss the charges was denied, and, his conviction was upheld.

Petitioner also cites *United States* v. *Butler*, 567 F.2d 885 (9th Cir. 1978). In *Butler*, a new trial was ordered when the Court concluded that prosecution concealed the true nature of its dealings with its key

witness, and, knowingly permitted false testimony. This decision is not in conflict with the Pennsylvania Supreme Court's decision not only because there is no claim of such misconduct in petitioner's case, but also because re-trial was deemed a sufficient remedy in *Butler*.

Lastly, petitioner cites *United States* v. *Banks*, 383 F. Supp. 389 (D.S.D. 1974), appealed dismissed sub nom., *United States* v. *Means*, 513 F.2d 1329 (8th Cir. 1975). There the Court held double jeopardy prevented reprosecution where the prosecutors:

> 1) refused to accept a verdict of 11 jurors after an 8-1/2 month trial; 2) failed to furnish the defense with a prior and completely contradictory statements of its key witness; 3) deceived the Court with regard to a serious crime allegedly committed by one of its key witnesses; 4) failed to correct the obvious false testimony of a key witness.

A review of the record in the instant case clearly demonstrates that there was no mistrial situation below which the prosecutors took advantage of, nor were there any attempts to hide prior statements or activities of its witnesses, nor was the Court deceived, nor was false testimony knowingly permitted.

In summary, the Commonwealth submits that, once again, upon close examination of Petitioner's claim, it is not supported by the authority he cites.

C. No double jeopardy violation

Lastly, Petitioner asserts a double jeopardy violation, i.e., prosecutorial bad faith or harassment of a defendant can bar re-prosecution. He argues that the case at bar presents this Court with the occasion to define the scope of that rule, or, identify the kinds of conduct that fall within it. (Petition, p. 14, 15) The

Commonwealth contends that neither the facts of the case nor the relevant law demand this Court's granting of the Petition.

This Honorable Court has held that the Double Jeopardy Clause will bar a retrial if the defendant sought the mistrial as a result of prosecutorial misconduct amounting to "overreaching." *Lee* v. *United States*, 432 U.S. 23, 32 (1977). This court has enunciated principally two types of prosecutorial overreaching. First, there is the prosecutorial misconduct which is designed to provoke a mistrial in order to secure a second, perhaps, more favorable, opportunity to convict the defendant. *Downum* v. *United States*, 372 U.S. 734 (1963). Second, there is the prosecutorial misconduct undertaken in bad faith to prejudice or harass the defendant. *Lee* v. *United States*, *supra* at 33.

Instantly, as the Pennsylvania Supreme Court held, there is no prosecutorial misconduct here which forced the defendant to timely request a mistrial. (Petition, Appendix B. pp. 10a, 11a). Indeed, the Court held that Cohen "points to nothing on this record establishing that he made a timely request for a mistrial," (Id., at 11a), which calls into question the sincerity of his discovery on appeal of prosecutorial trial misconduct. Additionally, there is nothing in the record which establishes that the prosecutor sought to provoke a mistrial in order to secure a second more favorable opportunity to convict. Lastly, as a review of the evidence earlier in this Brief suggested, there was no prosecutorial misconduct undertaken in bad faith to prejudice or harass the defendant. The errors that did occur, while not to be condoned, warranted the granting of a new

trial, but do not constitute overreaching. As this Court has declared:

> The defendant's double jeopardy interests, however defined, do not go as far as to compel society to mobilize its decision making resources that it will be prepared to assure the defendant a single proceeding free from harmful governmental or judicial error. *United Sates* v. *Jorn*, 400 U.S. 470, 484 (1971).

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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On Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania

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REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

Respondent's Brief in Opposition ("Br. in Opp.") primarily attempts to dilute the impact of prosecutorial misconduct, the occurrence of which it cannot directly deny. This Reply will stress a few points useful in keeping matters in correct perspective and showing the illogic of Respondent's principal contentions.

1. Respondent denies that describing the electric chair and the smell of burning flesh to witnesses constituted a "threat." But such actions undisputedly had the effect of reducing the prosecution's chief witness to tears and eliciting statements inculpatory of Peti-

tioner Stuart Richard Cohen. Respondent is far off the mark in caviling about the "context" of this heinous activity. It is completely unexplainable *except* as a deliberate coercion of the witnesses, and could have had no other purpose.[1] Thus the issues set forth in the Petition as to whether such conduct requires dismissal of the indictment are squarely presented.

2. Respondent does not deny the impropriety of the prosecutor's extraordinary promise to key witness Anthony Reynolds to confer with the judge and "determine what could be done for Mr. Reynolds" (R. 35a).[2] This was *not* a usual plea bargain in which a prosecutor agreed to make a formal recommendation, but rather implied a special relationship with, and ability to obtain results from, "the Judge." Respondent notes (Br. in Opp., p. 3) that the promise was not carried out. Respondent does not explain how that makes it any less a part of a pattern of coercive threats and inducements.

3. Although acknowledging another procedural impropriety, Respondent is unable fully to agree with the testimony of the President Judge of the Court of Common Pleas (R. 55a) that the release from prison of Geisler, by means of the Assistant District Attorney's signing as surety, was "highly improper." It may be, as Respondent urges (Br. in Opp., p. 4) that any distraught felon "would benefit" from a release

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[1] That one witness, Jack Geisler, later accommodated the prosecutor by denying that he was "threatened" only underscores the completeness of the intimidation.

[2] "R." refers to the Appendix filed in the Supreme Court of Pennsylvania.

from incarceration, but it is extraordinary, and coercive, lenity for a prosecutor personally to sign out an accused murderer in this manner.

4. Respondent is incorrect in asserting (Br. in Opp., p. 5) that the record "contains no evidence that the district attorney instructed a potential witness not to speak to defense counsel prior to trial" and that there is "no evidence in the record that petitioner's counsel or investigators ever made an attempt to speak with Abraham or any other witness prior to trial." The undisputed evidence on this point, including affidavits of defense counsel, instead shows that witness Richard Wamsher, when approached by defense counsel, directly stated that he had received such instructions (R. 548a, 549a) and that the instructions to turnkeys quoted in the Petition (p. 6) applied generally (R. 461a). A belated order at trial that the prosecutor stop this outrage does not negate the fact of wilful pretrial obstruction of the defense.

5. Respondent admits (Br. in Opp., p. 6) that the District Attorney ordered the police prosecutor not to keep daily police records of the investigation, in contravention of normal practice. Respondent's excuse for this deliberate scrapping of orderly procedures—that police reports might leak to the public—on its face is disingenuous and unworthy. It ill behooves a prosecutor to so demean the responsibility of police officials. Coming from one who had severe investigatory excesses to conceal the excuse is particularly unacceptable if not incredible. Orderly procedure is the lifeblood of the law and the essence of due process; "[t]he history of liberty has largely been the history of ob-

servance of procedural safeguards", *McNabb* v. *United States,* 318 U.S. 332, 347 (1943) (Frankfurter, J.).[3]

6. The egregiously improper trial presentations of the prosecution are amply documented, through extensive quotations in the Petition. Those materials on their face show the deliberate and repeated character of this aspect of the misconduct, and refute any notion that it was "harmless." How, for example, can it be urged that repeated statements of the prosecutor to the effect that he "would not knowingly put a liar on the witness stand" (R. 485-486a) "were not so strong or abusive that they incited prejudice in the eyes of the jurors" (Br. in Opp., p. 7)? As on other matters, Respondent's arguments that somehow there is doubt as to the "context" of such trial conduct, are baseless. The context, and natural result, of such textbook overreaching of a prosecutor, was without subtlety: at every stage of the trial he tried to influence the jury improperly by placing the imprimatur of himself and his office upon the credibility of his admittedly (Br. in Opp., p. 3) "less than savory" witnesses, and otherwise injecting irrelevant prejudicial matter into the case.

* * * *

The faint effort of Respondent to diminish the importance of the Due Process and Double Jeopardy issues presented by the Petition is without substance. Whether those fundamental Constitutional doctrines

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[3] The prosecutor's orders in this regard not only prevented the compilation of a written record of investigatory excesses, but limited possible judicial scrutiny of official records for materials which would have had to be made available to the defense under *Brady* v. *Maryland,* 373 U.S. 83 (1963), and *Jencks* v. *United States,* 353 U.S. 657 (1957).

are offended by a reprosecution in the face of the most egregious forms of prosecutorial misconduct is a matter which, Petitioner submits, warrants plenary review by this Court. Notwithstanding the arguments of Respondent, this case implicating the very integrity of judicial proceedings is an appropriate one for this Court to give content to the principles stated in such cases as *United States* v. *Russell,* 411 U.S. 423, 431-432 (1973); and *Arizona* v. *Washington,* 434 U.S. 497, 508-509 (1978), as discussed in the Petition (pp. 13-15).

CONCLUSION

For the reasons stated above, and in the Petition, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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